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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER JOURNAL AND
THE LOUISVILLE TIMES),

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 1, 1977.[1]

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[1]The Court of Appeals considered in a single opinion both this case (No. 75-1064) and several companion cases (Nos. 75-1152,

[footnote continued]

OPINIONS BELOW

The opinion of the Court of Appeals (FCC App.[2] 1-60) has not yet been reported. The *Second Report and Order* of the Federal Communications Commission is reported at 50 F.C.C.2d 1046 (1975) and its *Memorandum Opinion and Order* denying petitions for reconsideration at 53 F.C.C.2d 589 (1975) (FCC App. 61-158).

75-1289, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, 75-1618) below. Petitioner Channel Two Television Company is the licensee of television and radio stations in Houston commonly owned with the *Houston Post*, which is published by petitioner The Houston Post Company; petitioners The Chronicle Publishing Company and Chronicle Broadcasting Company commonly own the *San Francisco Chronicle* and television and radio stations in San Francisco; petitioner KSL, Incorporated, is the licensee of television and radio stations in Salt Lake City which are commonly owned with the *Deseret News* through a parent corporation, petitioners The Washington Post Company and Post-Newsweek Stations, Capital Area, Inc., commonly own *The Washington Post* and television and radio stations in Washington. Petitioner WHAS, Inc., is the licensee of television and radio stations in Louisville which are commonly owned with *The Courier Journal* and *The Louisville Times*. All there petitioners were parties in Case No. 75-1064, and some were parties in one or another of the companion cases.

This petition is also supported by The Evening News Association, which owns *The Detroit News* and television and radio stations in Detroit, and The Pulitzer Publishing Company and KSD/KSD-TV, Inc., which commonly own *The St. Louis Post-Dispatch* and television and radio stations in St. Louis. These newspaper-broadcaster cross-owners were parties to the FCC proceeding below but not to the court case.

[2]The FCC has petitioned for certiorari to review the decision involved in this petition and has included the opinions of the court, the report and opinion of the agency in the proceedings below and pertinent provisions of the Communications Act as Appendices A-F filed with its petition. References to these appendices will be cited as "FCC App." Provisions of the Communications Act relied on and not included in the FCC's appendices are set forth in an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals, which was entered on March 1, 1977, appears at FCC App. 159-60. The Court of Appeals granted a partial stay of its mandate on April 5, 1977 (FCC App. 161-67). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented by the Court of Appeals decision are:

1. Whether the Communications Act requires that newspapers and broadcast stations in the same community which have long been commonly owned must now be broken apart by divestiture without any showing of public harm, and if not, whether a reviewing court may order the Federal Communications Commission to require such divestiture when the Commission has determined that the public interest will not be served thereby.

2. Whether a reviewing court may substitute its judgment for that of the Federal Communications Commission by requiring the Commission to apply retroactively a new licensing policy adopted by the Commission prospectively in the hope of increasing diversity.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 309(a) and 309(d)(1) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§152(a), 154(i), 154(j), 301, 303(g), 309(a) and 309(d)(1), are set forth in FCC App. 168-170. Sections 307(a) and 307(d) of that Act, 47 U.S.C. §§307(a) and 307(d), are set forth in the Appendix to this Petition.

STATEMENT

Under the Communications Act of 1934, the Federal Communications Commission is empowered to grant and renew licenses to operate radio and television stations if it finds that public interest, convenience, or necessity will be served thereby. 47 U.S.C. §307(a), (d). The Commission has approved license applications of local newspaper owners under the public interest standard from the very first. Confronted with a scarcity of qualified and willing licensees, the Commission at one time actively encouraged newspaper owners to pioneer radio and later television service in their local communities. As the number of unoccupied frequencies has diminished and the number of qualified license applicants has increased, in choosing among competing candidates for a new station the Commission has come to prefer applicants who do not own a local newspaper, on the ground that they are theoretically more likely to add to the diversity of viewpoints expressed through the media in the market. But the licenses already held by newspaper owners have been consistently renewed if the station's performance has served the public interest and if the licensee has not been guilty of a pattern of abuse of its common ownership or of other improper conduct.

THE ADMINISTRATIVE PROCEEDINGS BELOW

This proceeding began in 1968 with the FCC's proposal to adopt rules proscribing new common ownership of more than one full-time broadcast station in the same market.[3] The proposed rules did not contemplate divestiture of the numerous existing radio-television

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[3] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rulemaking, 33 Fed. Reg. 5315 (1968).

or AM-FM radio combinations. The question of newspaper ownership was not addressed at all.

The proposed prospective ban was adopted as to common ownership of a VHF television station and a radio station in a *First Report and Order* of March 1970.[4] Simultaneously, the Commission issued a further notice of rule-making to consider, *inter alia*, whether this ban should be applied retroactively to existing radio-television combinations, and whether common ownership of a daily newspaper and a broadcast station in the same community ("newspaper cross-ownership") should be similarly proscribed.[5] In its *Second Report and Order*, after a five-year evidentiary proceeding which generated a voluminous record, the Commission decided to adopt the prospective ban on newspaper cross-ownerships, but not to order any divestiture of existing licensees except in communities where the only newspaper and television station, or the only newspaper and radio station in a market not served by a television station, were commonly owned.[6] Its final rules ordered divestiture within five years of 16 newspaper-broadcast combinations, but grandfathered all other existing newspaper cross-ownerships and all radio-television combinations.

The Commission was unable to find in the vast record of studies, evidentiary showings, and comments before it, any substantial public interest problem involving cross-

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[4]*See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970).

[5]Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 F.C.C.2d 339 (1970).

[6]*See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975) (FCC App. at 61-147), *reconsideration denied*, 53 F.C.C.2d 589 (1975) (FCC App. 148-158).

ownership that called for regulatory relief.[7] There was no showing of any pattern of misuse of commonly-owned media by newspaper cross-owners, either to indoctrinate or censor, or to obtain unfair commercial advantage over competitors. The record did not show any trend of increasing media concentration in local markets.[8] Nor did the Commission find any general lack of diversity of information or points of view or any dearth of independently-owned media sources in most communities.

The Commission nonetheless adopted its prospective newspaper rule because of its determination that, with radio and television now in their maturity and qualified applicants no longer in short supply, "the special reason for encouraging newspaper ownership . . . is no longer generally operative in the way it once was." (FCC App. 90). Recognizing "the changes which have taken place," the Commission decided that "any new licensing should be expected to add to local diversity." (*Id.*). It acknowledged that the expectation of increased diversity of media content attributable to the selection of a licensee unrelated to a local newspaper rested only on "theory," and might be small even where real. (FCC App. 89-91). But because of the importance it attached to diversity as a public interest objective, even a small gain

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[7]The lack of support for such a finding was not due to any lack of participation on the part of advocates of divestiture. Broadscale divestiture was supported not only by such organizations as the National Citizens Committee for Broadcasting, the National Black Media Coalition, the Community Coalition for Media Change, and the National Council of the Churches of Christ, but also by the Antitrust Division of the Department of Justice.

[8]In fact, the record showed that both the percentage and the absolute number of separately-owned newspaper and broadcast media serving individual markets have been increasing, not decreasing, over the years. (FCC App. 88).

of this sort seemed "worth pursuing" where it could be accomplished through prospective rules without disruption of existing service or other substantial public interest costs. (*Id.* 91).

The Commission was unwilling, however, to apply its change of policy retroactively to divest long-established newspaper cross-owners without a showing of some affirmative need for remedial action. The proposal to dispossess these licensees raised not only considerations of fairness (*id.* 89, 93), but also the prospect of deleterious effects on broadcast service from "the disruption and losses which could be expected to attend divestiture." (*Id.* 93-95). The existing licensees as a group had established notable "traditions of service." Most were local owners, long committed to broadcasting in their home communities. In an industry where the Commission had long been concerned about trafficking and the high rate of turnover of broadcast licenses often acquired primarily as investments,[9] the newspaper owners display an unusual continuity of ownership:

> "Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities there is a long record of service to the public." (*Id.* 93).

A Commission study also showed "an undramatic but nonetheless statistically significant superiority in newspaper-owned television stations in a number of program

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[9]See, for example, Applications for Voluntary Assignments or Transfers of Control, 32 F.C.C. 689 (1962).

particulars," including the amount of news, public affairs, and other local programming they carry. (*Id.* 93 n.26, 109-113). Divestiture would deny local communities the service of these licensees, destroy their exceptional continuity, and risk the loss of local ownership as well.

To justify consequences such as these, the Commission said it would require a stronger showing than "just theory or narrowly drawn balances." (*Id.* 91). The Commission found a sufficiently stronger showing, prima facie, in markets where newspaper cross-owners faced no "full-fledged" independently-owned mass media competition providing full coverage of local affairs. (*Id.* 96). But absent such an "effective monopoly" (*id.*) of newspaper and broadcast media, the Commission concluded that divestiture for the sole purpose of maximizing the theoretical quantum of diversity in each market would not serve the public interest.

THE COURT OF APPEALS DECISION

In the Court of Appeals, no party disputed the decision not to divest existing radio-television combinations. However, besides the numerous petitions challenging the prospective newspaper ban and the limited newspaper divestiture order, two parties challenged the decision to grandfather most existing newspaper cross-ownerships. Both the Antitrust Division of the Justice Department and the National Citizens Committee for Broadcasting ("NCCB") focused their attacks specifically on television-newspaper combinations. In fact, the Antitrust Division has not sought general divestiture of radio-newspaper combinations at all.

The court's horizons are not so limited. The court not only invalidates the Commission's grandfather rules. It affirmatively requires a general divestiture of newspaper cross-ownerships, for radio and for television alike.

It holds that the Commission is bound by "a presumption against cross-ownership" and on remand must follow a "policy of giving diversity of media ownership controlling weight." (FCC App. 56-57, 167). Accordingly, having affirmed the prospective ban on *new* newspaper cross-ownerships, it orders the Commission on remand "to ensure that *everyone* [will] be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure . . .)." (*Id.* 167) (emphasis added).

This extraordinary holding is not based on any dispute with the Commission's conclusion "that the factual case for broad-scale divestiture had not been made." (*Id.* 47). The court finds the record "essentially inconclusive" as to any actual negative effects on the public interest attributable to newspaper cross-ownership in general or to existing cross-ownerships in particular. (*Id.* 49). Therefore, it says the question before the Commission turned "primarily on policy, not factual considerations." (*Id.* 38, footnote omitted).

As a matter of policy, the court holds that the Commission erred "in refusing to order divestiture in the absence of a showing of tangible public interest harm." (*Id.* 50). In the court's view, the Commission should have adopted a "presumption that cross-owned stations do not serve the public interest." (*Id.* 51). This presumption is said to find "support" in the Commission's obligation under the Communications Act to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. §303(g), in the "policies of the First Amendment" favoring diversity, and "perhaps most importantly, [in] the Commission's long-standing policy . . . that diversification of media sources is of central importance." (App. 51, footnote omitted).

On the question of retroactive application of the Commission's new cross-ownership policy, the court

notes that, under the Communications Act, broadcast licensees have no "vested right" in their licenses, and may be denied renewal if the Commission determines that the public interest so requires. (*Id.* 50). In a subsequent footnote, the court says that considerations of fairness to existing licensees are "impermissible," since "[l]icensing is to be in the public, not private interest." (*Id.* 55 n.101).

The court disparages each of the Commission's other countervailing policies and values as unpersuasive or unimportant. The policy favoring local ownership is dismissed as "of little concern to the Commission" (*id.* 52); in any event, the court finds no reason to suppose that local ownership will be reduced by divesting the licensees of newspaper cross-owners. (*Id.* 53). The court decides that the loss of the unusual continuity of operation provided by newspaper cross-owners is of little if any significance. It discounts the Commission's findings that existing newspaper-related television stations have superior programming, because "the Commission did not *stress* this superiority in deciding to grandfather most stations," and because "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest." (*Id.* 39-40) (emphasis added). The court also advances other arguments against the Commission's policies, but the foregoing are representative of the nature and tone of its debate with the Commission.

All these Commission policies, the court concludes, are "lesser policies" than diversity. (*Id.* 57). In addition, they are not supported by factual showings in the record that breaching them would entail actual harm to the public interest. (*See* FCC App. 48-49, 56-57). "In sum, the Commission could not have rationally concluded that [they] . . . justified grandfathering absent a show of harm," or that "their potential impairment overcame the

presumption against cross-ownership." (*Id.* 56-57, footnote omitted). Divestiture is therefore required except in special cases "where the evidence clearly discloses that [a] cross-ownership is [affirmatively] in the public interest," and the Commission is instructed to adopt a divestiture rule on remand, subject to a waiver provision for the exceptional cases. (App. 60, 167).

REASONS FOR GRANTING THE WRIT

The court's holdings that the Commission is required to give "controlling weight to diversity," and to apply its new cross-ownership policy retroactively to divest meritorious licensees without any showing that they have harmed the public interest, are without precedent. They reverse long-standing Commission policies, without any warrant in the statute or the decided cases. They substitute judicial judgment for agency judgment in balancing public interest considerations. They override the fundamental bias of the legal system against retroactive law-making. The court has dictated not only the result but even the substance of the rule that the agency is to adopt on remand. It has in all these respects departed radically from the proper role of an appellate court in reviewing agency rulemaking, as defined by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). The departure is so extreme and so unfounded as to call for the exercise of this Court's power of supervision.

The decision is important because of the potential sweep of the controlling presumption it erects against existing cross-ownership, as well as for its impact on the law. Its immediate application is to require restructuring of the broadcast industry on a nationwide scale, through

the forced sale of properties in over 50 television markets and the forced breakup of some 160 newspaper-radio combinations. The future consequences may be far greater. Common ownership of multiple local media of various kinds is commonplace. The radio-television cross-ownerships all grandfathered in the agency proceeding below appear to have escaped the court's divestiture decree in this case only because no party thought to appeal the decision to grandfather them. The Commission has also grandfathered cross-ownerships of television and cable systems approved prior to adoption of a prospective ban, on the very principles the court rejects as irrational. In addition, there are large numbers of AM-FM radio cross-ownerships, which the Commission has not banned even prospectively. If the court's presumption against cross-ownership stands in this case, notwithstanding the special equities and merit of the newspaper cross-owners as licensees, nothing in its opinion suggests that it would look differently on these other established cross-ownerships standing in the way of the court's policy of maximum feasible diversification. The court's unprecedented assertion of authority should be checked at the outset.

Under the Communications Act of 1934, the Commission is charged with the legislative responsibility for giving content to the statutory standard of public interest, convenience or necessity. The role of the courts in the substance of such legislative policy judgments is only "to correct errors of law" which the Commission may have made in reaching or articulating its judgment. *FCC v. Pottsville Broadcasting Co., supra,* 309 U.S. at 145; K. Davis, *Administrative Law of the Seventies,* §29.01 (1976). Otherwise, in reviewing an FCC rulemaking under the "arbitrary and capricious" standard of §706(2)(A) of the Administrative Procedure Act, the court's role is to determine that the agency's action is

rational and "based on a consideration of the relevant factors." *Citizens of Overton Park v. Volpe, supra,* 401 U.S. at 416; *Bowman Transportation Co. v. Arkansas-Best Freight Systems, supra,* 419 U.S. at 290 (1974); *see also Ethyl Corp. v. EPA,* 541 F.2d 1, 34 (D.C. Cir. 1976). "The court is not empowered to substitute its judgment for that of the agency." *Citizens of Overton Park v. Volpe, supra,* 401 U.S. at 416.

In this case, the court instructed the Commission that it must approach the question of divestiture with a "presumption against [continued] cross-ownership." (FCC App. 56-57). The Commission has repeatedly found, in triennial license renewals, that the newspaper cross-ownerships in question are consistent with the public interest. The court-imposed presumption thus requires the Commission to presume that its longstanding policy is wrong. Such a reversal on the merits of established Commission policy could be within the court's authority only if required by applicable law.

The court contends that its presumption is grounded in the Communications Act and "First Amendment policies." But newspaper cross-ownership has been permitted under the Communications Act throughout the 43 years since its enactment.[10] In all that time, no court has suggested that the Act, much less anything in the First Amendment, forbids cross-ownership or compels any presumption against continued licensing of previously approved cross-ownerships which have served the public well. If the Court of Appeals has now uncovered a long-unnoticed requirement of the law, this belated discovery presents an important federal question which has not been, and now should be, reviewed by this Court.

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[10] *See, e.g.,* Pinellas Broadcasting Co. v. FCC., 230 F.2d 204 (D.C. Cir.), *cert. denied,* 350 U.S. 1007 (1956).

Absent such a requirement of law, the court's imposition of a controlling presumption against continued cross-ownership usurps the public interest responsibilities which Congress delegated to the Commission. The court seeks to justify its reversal of Commission policy as compelled by the Commission's own "diversification policy" applicable to comparative licensing proceedings involving applicants for new licenses, where the Commission prefers applicants who will add a new media owner in the market over those who already own a local medium. Although the court was confused on the point, this policy is not and never has been applied by the Commission to meritorious incumbent licensees.[11] In renewal proceedings involving such licensees, the Commission takes the position that a record of proven meritorious service in the public interest may be controlling.[12]

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[11]The court apparently meant to state that the Commission applies the 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), in a renewal context (FCC App. 10 n.9, 52 n.94), although typographical errors make its meaning ambiguous. In any case, the Statement in fact has been applied only to the introduction of evidence, but not to the weighing of competing considerations in the final decision, in renewal cases involving a meritorious incumbent. See Seven (7) League Productions, Inc., 1 F.C.C.2d 1597, 1598-99 (1965); *accord* Belo Broadcasting Corp., 47 F.C.C.2d 540, 544 (1974). Thus, in Greater Boston Television Corp. v. FCC., 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), 406 U.S. 950 (1972), a renewal applicant was treated like a new applicant only because "unique events and procedures . . . place[d] WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." 444 F.2d at 849, 854. The court indicated, however, that in a conventional renewal case involving an incumbent with a meritorious record it would have been inappropriate to have given diversity controlling weight. *See* 444 F.2d at 854.

[12]*See* Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing

[footnote continued]

Ironically, the Commission itself could not have adopted the court-imposed presumption against continued cross-ownership without explaining why so drastic a change in its policy is required.[13] Yet the court does not suggest that any change of circumstances compels or supports the policy reversal. On the contrary, it accepts the Commission's conclusion that the record below does not present a factual case for divestiture. The Commission explained its prospective policy change—foreshadowed by its pre-existing policy of disfavoring competing applicants for new facilities if they have newspaper or other local media affiliations—partly on the ground that there is no longer a special need for newspapers to act as broadcast pioneers in their local markets and partly in terms of a policy to maximize diversity where it can do so without divestiture. Those rationales obviously do not support a new policy of required divestiture. The court has thus imposed on the Commission a policy change which the Commission, without more, could not lawfully have reached.

As this anomoly reveals, in substance the court has simply disagreed with the Commission's priorities and

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Process, Docket No. 19154, Report and Order, April 7, 1977, FCC 77-204, ___ Fed. Reg. ___; Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970); Greater Boston Television Corp. v. FCC, *supra*, 444 F.2d at 854 (D.C. Cir. 1970). The 1970 Policy Statement on Comparative Hearings, *supra*, was struck down in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), on the ground that the procedures it mandated were defective. However, the court in *Citizens* noted that "incumbent licensees should be judged primarily on their records of past performance." 447 F.2d at 1213.

[13] Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206, *cert. denied*, 350 U.S. 1007 (1956).

imposed its own public interest judgment instead. The court does not suggest that the Commission failed to take account of relevant factors. The Commission gave expansive recognition to the importance of diversity as a public interest value in adopting its prospective ban without any affirmative showing of need. It articulated rational reasons, grounded in established Commission policies, for not ordering general divestiture in the absence of such a showing. Although the court characterizes the decision to grandfather as irrational, its argumentative debate with the Commission's reasons for not requiring divestiture does not show that the Commission's concerns are unintelligible or unfounded, but only that in the court's view they all serve "lesser policies" than diversification of broadcast ownership. In short, this is a textbook case of a court's "substitut[ing] its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 416.

Moreover, in two respects the court carries this basic error beyond the textbook model. First, it holds that the Commission could not rationally require a stronger showing to support retroactive application of its new policy toward newspaper cross-ownerships than for the prospective rule. Second, having re-balanced the public interest considerations underlying the Commission's grandfather rule, the court not only vacates the rule but instructs the Commission to adopt a new rule codifying the court's balance.

1. The extent of the court's intrusion on the Commission's public interest discretion is most apparent in its insistence that the Commission must give its change of policy toward newspaper cross-ownerships full retroactive effect. The Commission decided that it should eschew retroactive application except in a class of so-called "egregious" cases where it concluded there was

an affirmative public interest need. The court holds that it is irrational for the Commission to distinguish between prospective and retrospective application.

In so holding the court invalidates yet another long-established Commission policy. The Commission, in changing policies, has frequently grandfathered previously approved non-conforming arrangements or otherwise distinguished between prospective and retroactive applications.[14] It has done so specifically in establishing new rules and policies to promote diversification of ownership.[15] The distinction is expressly incorporated in existing FCC multiple ownership rules.[16] In some cases the Commission has expressly referred to the "inherently disruptive consequences of divestiture";[17] in many it has grandfathered without any such reference.

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[14] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg. 1801, 1831-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784 (1966) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems).

[15] *See* Multiple Ownership of Standard, FM, and Television Broadcast Stations, 45 F.C.C. 1476 (1964); Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964); Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965); Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); Multiple Ownership of Standard, FM & TV Broadcast Stations, 22 F.C.C.2d 306 (1970).

[16] 47 C.F.R. §§ 73.35 n.8, 73.240 n.8, and 73.636 n.8.

[17] *E.g.*, FCC Report on Chain Broadcasting (Order No. 37, Dkt. No. 5060 (1941) at 67; Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 789 (1966); Diversification of Control of CATV Systems, 23 F.C.C.2d 833, 835 (1970).

No court until now, to our knowledge, has held that grandfathering requires any special justification.[18] As this Court has recognized, the freedom to change course on a prospective basis only without prejudice to established expectations based on prior policy is an essential tool in the legislative process of Congress and agencies alike. *United States v. Maher*, 307 U.S. 148, 153 (1939). Prospective rules permit the legislator to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time . . . [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *Id.; see also Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 227-28 (D.C. Cir. 1967).[19]

The court's inexplicable assertion that fairness to private parties may not be considered as an element of the public interest (FCC App. 55 n.101) runs counter to the grain of the fundamental bias against retroactive law-making rooted in the common law and the concept of due process.

> "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." Story, *Constitution*, §1398 (1898).

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[18] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 206-07 (1943); Committee for Open Media v. FCC, 533 F.2d 1 (D.C. Cir. 1976); Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (D.C. Cir. 1974); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967); Storer Broadcasting Co. v. United States, 240 F.2d 55, 56 & n.3 (D.C. Cir. 1956); Jefferson Standard Broadcasting Co. v. FCC, 297 F.Supp. 784, 785-86 (W.D.N.C. 1969).

[19] When an agency acts prospectively, it has broad discretion to experiment, innovate, or change direction. *See* Frontier Airlines v. CAB, 439 F.2d 634, 640 (D.C. Cir. 1971); Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835, 837-38 (D.C. Cir. 1962); American Airlines v. CAB, 192 F.2d 417 (D.C. Cir. 1951).

Where such laws are not unconstitutional,[20] they are nonetheless disfavored. If statutes are ambiguous as to whether they are to apply retroactively, they are "presumed, in the absence of clear expression to the contrary, to operate prospectively." *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *Claridge Apartments Co. v. Comm'r*, 323 U.S. 141, 164 (1944); *Place v. Weinberger*, 497 F.2d 412, 414 (6th Cir. 1974). And to avoid retroactivity, agencies are expected insofar as possible to make policy through the "quasi-legislative promulgation of rules to be applied in the future," rather than by adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

In some cases, the courts have forbidden agencies to give retroactive effects to a new rule, on the ground that to do so would be unfair.[21] The court decides, in view of the limited rights of a broadcast licensee in its license, that this is not such a case.[22] It says that "the contention that divestiture contains elements common to suspect retroactive legislation goes not to the existence of Commission authority, but rather to the reasonableness of its exercise." (FCC App. 34, footnote omitted). But having concluded that the Commission is *not required* to grandfather absent evidence of harm, (*id.* at 34, 50), the court never explains why the Commission is *required not* to do so. By denying the Commission the discretion

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[20] *E.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Coombes v. Getz, 285 U.S. 434 (1932).

[21] *See, e.g.*, Retail, Wholesale, and Dept. Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); NLRB v. E&B Brewing Co., 276 F.2d 594, 600 (6th Cir. 1960).

[22] In so deciding the court disregards the well-established reasonable expectancy of renewal of a licensee with a record of meritorious service. Greater Boston Television Corporation v. FCC, *supra*, 444 F.2d at 854; Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976).

enjoyed by all other agencies to act on the "premise that divestiture, as retroactive legislation, is inherently suspect" (FCC App. 33), the court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."[23]

2. The court has also gone to the extraordinary length of dictating to the Commission the result it must reach on remand. By affirming the Commission's prospective ban and requiring the Commission to apply the standard of that rule consistently to existing cross-owners, the court has denied the Commission the elementary prerogative of itself making the final assessment of what the public interest requires in light of the purported legal errors identified by the court. The court thereby contravenes the basic principle of appellate review that administrative public interest determinations, unless mere formalities, may be made only by the agency, and not by a reviewing court. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), *NLRB v. Food Store Employees Union*, 417 U.S. 1, 8-9 (1974). And it directly conflicts with this Court's teaching in *FCC v. Pottsville Broadcasting Co., supra.*

In *Pottsville*, the Court of Appeals once before sought to go beyond identifying Commission error and to impose a final result. This Court reversed an order directing the Commission to accept the court-imposed result. A reviewing court, it said

> "may . . . correct errors of law and on remand the Commission is bound to act upon the correction. [Citations omitted]. But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the

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[23]Supreme Court Rule 19.

> administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." [Citation omitted.]. 309 U.S. at 145.

Once the court had identified the legal error in what the Commission had done, it had

> "exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of 'public interest, convenience or necessity' . . . The Court of Appeals cannot write [its views] . . . into the statute as an indirect result of its power to scrutinize legal errors. . . . Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute." *Id.*

The rule confining a reviewing court's role to identification of legal error, besides preserving the "integrity of the administrative process,"[24] protects against the possibility that law will be made on the basis of a court's misapplication or misunderstanding of agency policies, or an inadequate consideration of the relevant public interest factors by the agency, or a mere failure of articulation or explanation in an agency opinion. If the agency is not given a chance to repair such non-legal mistakes, whether the court's or its own,

> "the contingencies of judicial review and litigation, rather than the public interest, would be decisive factors. . . ." *FCC v. Pottsville Broadcasting Co., supra*, 309 U.S. at 145-46.

In the present case, this danger is more than academic. The court misconstrues the agency's diversification policy, elevating diversity from an important public

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[24]NLRB v. Food Store Employees Union, *supra*, 417 U.S. at 9.

interest factor into a virtually irrebuttable presumption. That aside, its denigration of the Commission's concerns about losing the public benefits of the unusual continuity and the local ownership provided by the existing newspaper cross-owners as a group reflects a misunderstanding of the Commission's policies.[25] In holding the Commission bound by its alleged failure to state satisfactory reasons for not "giving diversity of media ownership controlling weight" (FCC App. 167), the court imprisons the Commission in any inadequacies of its opinion writer and writes the court's misunderstanding of Commission policies into law.

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[25]For example, the court's arguments that "a one-time alteration in the ownership structure of the broadcast industry should not effect [sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity," and that the concern for continuity "is at odds with [the Commission's] practice of routinely approving license assignments" (FCC App. 54), reveal the court's unfamiliarity with the Commission's continuity policy as previously articulated and applied. The Commission has long been concerned about the "important public interest question of whether numerous communities throughout this country are being deprived of the benefits which we [the Commission] believe, based upon our experience, come from sustained station ownership." Applications for Voluntary Assignments or Transfers of Control, 32 F.C.C. 689, 690 (1962). Because of its "great concern" at the high rate of turnover of broadcast licenses, the Commission adopted a rule requiring a full hearing to justify any license transfer during the first three-year license term. 47 C.F.R. §1.597 (1976); Notice of Proposed Rulemaking, 25 Fed. Reg. 12898 (1960). The Commission has not thought it wise to lock in licensees who do not wish to continue after three years, but the fact that a substantial turnover is therefore still allowed accentuates rather than diminishes the importance of preserving exceptional continuity where it is found. The Commission has reason to believe that the "one-time" disruption of continuity a general divestiture would entail involves more than a temporary loss while the new owners acquire experience in broadcasting to the local community: the record shows that new licensees who do not own newspapers are far less likely to make comparable long-term commitments.

The court's plain error presents the same occasion for this Court's review as did the same error of the same court in *Pottsville*, and *NLRB v. Food Store Employees Union, supra*. Here, the error is presented in the context of a much broader departure from the accepted limitaon the scope of appellate review. This Court's review, and restraint, is required.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 *et seq.*

§307. Licenses; allocation of facilities; terms; renewals.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition

of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, THE HOUSTON POST COMPANY, CHRONICLE BROADCASTING COMPANY, THE CHRONICLE PUBLISHING COMPANY, KSL, INCORPORATED (DESERET NEWS), POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., THE WASHINGTON POST COMPANY, WHAS, INC. (THE COURIER JOURNAL AND THE LOUISVILLE TIMES), *Petitioners*,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*.

JOINT STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Come now Belo Broadcasting Corporation, The Hearst Corporation, Scripps-Howard Broadcasting Company and The E. W. Scripps Company, respondents herein, and, by their attorneys, submit the following joint statement:

Belo Broadcasting Corporation is the licensee of standard, FM, and television broadcast stations. A. H. Belo Corporation, the beneficial owner of Belo Broadcasting Corporation, is the publisher of daily newspapers. Some of the broadcast stations licensed to Belo Broadcasting Corporation and the newspapers published by the A. H. Belo Corporation are "co-located."

Scripps-Howard Broadcasting Company is the licensee of standard, FM, and television broadcast stations. The E. W. Scripps Company, the majority stockholder of Scripps-Howard Broadcasting Company, has ownership interests in daily newspapers, some of which are "co-located" with the broadcast stations.

The Hearst Corporation is the licensee of standard, FM, and television broadcast stations, and the publisher of daily newspapers, some of them "co-located."

Each of the respondents was a party to the rulemaking proceeding before the Federal Communications Commission, which proceeding culminated in the *Second Report and Order*, 50 FCC 2d 1046, on reconsideration, 53 FCC 2d 589 (reproduced in the Federal Communications Commission's Appendix to its Petition for Writ of Certiorari, No. 76-1471, at pp. 61-158). Each was an intervenor in the proceeding to review the *Second Report and Order* in the United States Court of Appeals for the District of Columbia Circuit. A panel of that court vacated a portion of the Federal Communications Commission's *Second Report and Order* and remanded the record for adoption of a rule in conformity with the court's opinion. *National Citizens Committee for Broadcasting, et al.* v. *Federal Communications Commission and United States of America, et al.*, No. 75-1064 (FCC App. 1-60). Simply stated, the

court below reversed that portion of the FCC's *Second Report and Order* which declined, except in "egregious" cases, to ban cross-ownership of existing co-located broadcast stations and daily newspapers. Under the court's decision below, respondents would be adversely affected.

Respondents support the Petition for Writ of Certiorari filed May 2, 1977, by the Petitioners herein, and, for the reasons expressed therein, respectfully urge this Court to issue such Writ.

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Nos. 76-1471, 76-1521, 76-1595, 76-1604
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IN THE

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OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
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CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
THE LOUISVILLE TIMES),
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

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[Consolidated cases listed on inside cover]

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

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No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

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THE POST COMPANY, ET AL., *Petitioners*

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
THE LOUISVILLE TIMES),

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, filed March 1, 1977, may be found at pp. 339-431 of Volume I of the Joint Appendix (hereinafter cited as "J.A."),[1] and is reported at 555 F.2d 938.[2] That court's opinion on the

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[1] Volume II of the Joint Appendix will be cited as "Exh."

[2] The Court of Appeals considered in a single opinion both this case (No. 75-1064) and several companion cases (Nos. 75-1152, 75-1289, 75-1379, 75-1386, 75-1387, 75-1388, 75-1567, and 75-1618). Petitioner Channel Two Television Company is the licensee of television and radio stations in Houston commonly owned with the *Houston Post*, which is published by petitioner The Houston Post Company; petitioners The Chronicle Publishing Company and Chronicle Broadcasting Company commonly own the *San Francisco Chronicle* and a television station in San Francisco; petitioner KSL, Incorporated, is the licensee of television and radio stations in Salt Lake City which are commonly owned with the *Deseret News* through a parent corporation; petitioners The Washington Post Company and Post-Newsweek Stations, Capital Area, Inc., commonly own *The Washington Post* and television and radio stations in Washington. Petitioner WHAS, Inc., is the licensee of television and radio stations in Louisville which are commonly owned with *The Courier-Journal* and *The Louisville Times*. All

Commission's motion to stay the mandate, filed April 5, 1977, appears at J.A. 435-444, and is reported at 555 F.2d 967. The *Second Report and Order* of the Federal Communications Commission may be found at J.A. 134-221 and is reported at 50 F.C.C.2d 1046 (1975). The Commission's *Memorandum Opinion and Order* denying petitions for reconsideration appears at J.A. 317-338 and is reported at 53 F.C.C.2d 589 (1975).

JURISDICTION

The judgment of the Court of Appeals, which appears at J.A. 432-434, was entered on March 1, 1977. A petition for certiorari was filed by the present petitioners on May 2, 1977, and other petitions were filed, respectively, by the Federal Communications Commission on April 22, 1977, by the National Association of Broadcasters on May 13, 1977, by the American Newspaper Publishers Association on May 16, 1977, by Illinois Broadcasting Company, Inc. on May 20, 1977, and by The Post Company on May 27, 1977. These petitions were all granted on October 3, 1977, and the cases were consolidated for argument. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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these petitioners were parties in Case No. 75-1064, and some were parties in one or another of the companion cases.

This brief is also supported by the Evening News Association, which owns *The Detroit News* and television and radio stations in Detroit, and The Pulitzer Publishing Company and KSD/KSD-TV, Inc., which commonly own *The St. Louis Post-Dispatch* and television and radio stations in St. Louis. These newspaper-broadcaster cross-owners were parties to the FCC proceeding, but did not pursue appeals in the court below.

STATUTES INVOLVED

Sections 2(a), 4(i), 4(j), 301, 303(g), 307(a), 307(d), 309(a) and 309(d)(1) of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 154(i), 154(j), 301, 303(g), 307(a), 307(d), 309(a) and 309(d)(1), are set forth in J.A. 27-32.

QUESTIONS PRESENTED

The questions presented by the Court of Appeals decision are:

1. Whether the Communications Act requires that repeatedly-approved ownership of newspapers and broadcast stations in the same community must now be divested without any showing of public harm, and if not, whether a reviewing court may set aside a rational policy determination of the Federal Communications Commission that the public interest will not be served by divestiture.

2. Whether a reviewing court may substitute its judgment for that of the Federal Communications Commission by forbidding the Commission to grandfather existing licensees when adopting a new licensing policy prospectively in the hope of increasing diversity.

STATEMENT OF THE CASE

In 1975, after a five-year inquiry, the Federal Communications Commission adopted rules partly changing and partly continuing its traditional policy toward the common ownership of a newspaper and a broadcast station in the same community ("newspaper cross-own-

ership").[3] The rules preclude the creation of any new newspaper cross-ownerships, but grandfather existing combinations except in communities where the only daily newspaper and the only television station or the only broadcast station of any kind are commonly owned. Cross-owners in such communities must divest either the newspaper or the station within five years.

On review, the Court of Appeals affirmed the prospective rules barring new cross-ownerships but reversed the grandfather rules. The court held that the policy of the prospective rules must be applied to existing cross-ownerships as well, and instructed the Commission to require their divestiture subject to waiver in exceptional cases.

Background of the Administrative Proceeding

Local newspaper owners have operated broadcast stations in their home communities since the early days of broadcasting. In many cities they were the broadcast pioneers, who made the financial commitment and took the risks to establish the first radio or television station at a time when the prospects for profit were uncertain or distant. Confronted with a scarcity of qualified and willing licensees, the Commission not only granted licenses to these newspaper owners, but, in the case of television, affirmatively encouraged them to provide a local broadcast service.[4]

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[3] The text of the rules is set forth at J.A. 243-263. There are separate rules for cross-ownerships involving AM radio, FM radio, and television stations respectively.

[4] Second Report and Order at ¶ 100, J.A. 190; National Ass'n of Broadcasters' Comments and Arguments on the Proposed Rules (April 8, 1971) at 93-95.

The Commission's encouragement of newspaper cross-ownerships ceased as the supply of qualified applicants increased, but its approval of newspaper cross-ownership as consistent with the public interest did not. In choosing among competing applicants for new stations, the Commission came to favor those who lacked other media interests in the community, because such applicants were presumed more likely to add to the diversity of viewpoints expressed through the local media.[5] But like other such predictive presumptions developed by the Commission for selection among applicants for new stations, this policy has not been treated as controlling in proceedings for the renewal of existing licenses. The Commission has consistently renewed the licenses of the newspaper cross-ownerships that it previously encouraged or approved, if the licensee has not been guilty of a pattern of abuses of its common ownership and if the station's performance has otherwise served the public interest.

This long-standing distinction in Commission policy between new cross-ownerships and the renewal of existing licenses was preserved in the Notice of Proposed Rule-Making that initiated the first phase of the instant proceeding in 1968.[6] In that 1968 Notice, which did not apply to newspaper cross-ownerships, the Commission proposed a prospective rule barring the licensing of new *broadcast* cross-ownerships, *i.e.*, cross-ownerships of a television and a radio station or of an AM radio and an FM radio station in the same market.

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[5] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

[6] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rule-Making, 33 Fed. Reg. 5315 (1968).

Existing cross-ownerships were to be unaffected. Such a prospective rule was adopted as to television-radio combinations in a *First Report and Order* of March 1970.[7]

At the same time, the Commission issued a Further Notice of Proposed Rule-Making to consider whether newspaper cross-ownerships should be similarly proscribed.[8] Newspaper cross-ownership was to be considered primarily because studies submitted in the first phase of the proceeding had indicated that daily newspapers and television stations were the two sources most commonly looked to by the public for news and information about public affairs.[9] For this reason, the Commission hypothesized that "it is not desirable that these two organs of mass communication should be under the same control in any community."[10]

The Further Notice also invited comments on a proposal to break up by divestiture both all existing newspaper cross-ownerships and all existing television-radio cross-ownerships of the sort prohibited prospectively under the *First Report and Order*. Although the Commission had initially believed that divestiture should not even be considered, a few comments submitted in response to the 1968 Notice had urged dissolution of

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[7] Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970) (J.A. 33), *modified* in 28 F.C.C.2d 662 (1971). As later modified, the rule applied only to VHF television cross-ownerships, thus excluding UHF television stations.

[8] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Further Notice of Proposed Rule-Making, 22 F.C.C.2d 339 (1970) (J.A. 101).

[9] *Id.* at 344-46 (J.A. 111-115).

[10] *Id.* at 346 (J.A. 115).

existing combinations as a means of further increasing diversity in local media,[11] and the Commission inferred from other comments the possibility that divestiture could be accomplished without serious disruption.[12] The Commission nonetheless emphasized that it had "insufficient information on the subject,"[13] and voiced "substantial concern" about the potential disruptive effects of divestiture on the broadcast service of divested stations.[14]

The Record Developed Before the Commission

The public response to these new proposals was voluminous and broadly based. Some 200 parties filed written submissions in two separate rounds of comments and replies,[15] after which the Commission heard two and one-half days of oral argument from 45 parties.[16] The parties included not only affected broadcasters and newspaper owners, but also "public interest" advocates, economists and other researchers, student groups, private individuals, and the Antitrust Division of the Department of Justice. Besides argument, the submissions presented a variety of academic studies and research analyses of newspaper cross-ownership, and

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[11] *Id.* at 340 (J.A. 102-03).

[12] *See id.* at 341, 347-48 (J.A. 105, 118-19).

[13] *Id.* at 340 (J.A. 103).

[14] *Id.* at 348 (J.A. 119).

[15] Second Report and Order at Appendix A (J.A. 221). After the first round, the Commission requested additional comments focused on specific questions which it believed required further attention. Memorandum Opinion and Order, 45 F.C.C.2d 768 (1974) (J.A. 127).

[16] FCC Public Notice 26054-B, July 15, 1974 (Exh. 922).

numerous detailed examinations of the operating relations between specific commonly-owned newspapers and broadcast stations.

Although a number of parties supported the Commission's proposed rules, they relied almost entirely on theoretical and policy arguments rather than on evidence of actual practice. They emphasized the *potential* for abuse in the form of joint use of commonly-owned media to propagandize or to restrain competition, and the presumption that an increase in the number of independent competing media owners will increase either economic competition or the diversity of viewpoints expressed through the media. They also argued that there is an inherently undesirable media concentration in cross-ownership markets.[17] But "no claims were made that newspaper-television station owners have committed any specific non-competitive acts. . . ."[18] And there was no showing in the record of a pattern of other sorts of abuses of cross-ownership by existing cross-owners.[19] Similarly, only one submission

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[17] *See* Comments of the U.S. Dept. of Justice (May 18, 1971) at 22-30; Supplemental Comments of the U.S. Dept. of Justice (May 15, 1974) at 3-13; T. de Jonckheere, "Monopoly in the Media"; Further Comments of NCCB (May 15, 1974) (Exh. 843-844).

[18] Second Report and Order at ¶ 96 (J.A. 186).

[19] The only attempted showing of any such abuses in the record were remarks by three parties at oral argument, each citing a lone instance of alleged abuse. In fact, two of the three incidents involved alleged conduct of a single cross-owned medium ostensibly unrelated to cross-ownership. *See* Transcript of Oral Argument, F.C.C. Dkt. 18110 (Exh. 936, 942). The remaining allegation concerned a rule of a cross-owned newspaper prohibiting its employees from appearing on competing television stations. *Id.* (Exh. 938-939).

A broader showing of abuses was attempted *outside* the record in a paper by Stephen Barnett, mailed to individual Commissioners after the record was complete. "Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R.

made a substantial attempt to document any actual adverse consequences of newspaper-broadcast cross-ownership in general;[20] and its conclusion (that television stations commonly owned with newspapers in the same market charge somewhat higher advertising rates than other stations) was shown by other studies to be both defective in methodology and wrong in result.[21]

Markle Foundation" (1974) (Exh. 990). This paper collected from newspaper stories, magazine articles, congressional testimony and filings at the FCC all discoverable allegations of misconduct ever made against a newspaper cross-owner. Most of the allegations were untested hearsay. Some were contentions that had been tested and rejected by the Commission in other proceedings. Most were in any event not allegations of misuse of cross-ownership but rather allegations of misconduct involving a single medium of the sort that any owner might commit. Had it properly been a part of the record of this proceeding, the study would not have shown any pattern of abuses of cross-ownership. Although it was not part of the record, the court below saw "no harm in taking notice of it" in the process of concluding that "the record was essentially inconclusive" on the question of whether cross-ownership in practice had either harmful or beneficial results. (J.A. 403 n. 71, 403-04, 413-14).

[20] Owen, "Empirical Results of the Price Effects of Joint Ownership in the Mass Media" (1969), Appendix I of J. Rosse, B. Owen, D. Grey, *Economic Issues in Joint Ownership of Newspaper and TV Media* (referred to by the Commission as the "Rosse" study).

[21] Reply Comments of Post-Newsweek Stations, Capital Area, Inc. (June 17, 1974) (Exh. 899); A. Lago and D. Osborne, "A Quantitative Analysis of the Price Effects of Joint Mass Communication Media Ownership," Exhibit B (Revised) to NAB Comments, *supra* note 4. These studies show that, among its other errors, the "Rosse" study simply overlooked the obvious correlation between higher television advertising rates and larger audiences.

The Commission also considered a study purporting to demonstrate that the populace of one cross-ownership market (Zanesville, Ohio) was less well informed on public affairs than the populace of one community where there is no cross-ownership (York, Pennsylvania). American Institute for Political Communication, "The Effects of Local Media Monopoly on the Mass Mind" (1971) (*see* J.A. 187). The findings of this lone isolated case study could

On the other hand, the submissions in opposition to the proposed rules included a variety of studies of the extent of newspaper cross-ownership and its effects. Studies of this sort showed that the number of independently-owned major media in typical markets has greatly increased, not decreased, over the years;[22] that the incidence of newspaper-television cross-ownership has been decreasing both absolutely and in relation to the total number of television stations;[23] and that there is a variety of separately-owned media in all markets ranging as high as several hundred in typical large urban areas.[24] Another study demonstrated that newspaper cross-owners as a group provide much greater continuity of ownership than do other owners.[25] In

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readily be explained by the fact that the York market is served by many more major local media and reached by many more outside media than the small and remote Zanesville market. *See* M. Seiden, "Mass Communications in the United States" (1970), Exhibits A-2, A-4 to NAB Comments; *id.*, Summary Volume (Exh. 466).

[22] C. Sterling, "Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets: 1922-1967", Exhibit C to NAB Comments, *supra* note 4, and Supplement to Exhibit C (May 1974) (Exh. 680, 690-692, 868, 871).

[23] Sterling, *supra* note 22 (Exh. 682-687), and Supplement at Tables 7 and 8; J. Udell, "Economic Consequences of FCC Proposal and Critique of Relevant Literature," Comments of American Newspaper Publishers Ass'n (April 2, 1971) [hereinafter cited as "ANPA Comments"] Vol. II, Study D at D-27-D-29; ANPA Comments Study E at E-31; Supplemental Statement of NAB and Exhibit F Regarding Recent Transfers of Broadcasting Stations (Revised) (May 1974).

[24] Seiden, *supra* note 21; ANPA Comments, *supra* note 23, at E-21-E-30.

[25] Robbins, "A Study of Pioneer AM Radio Stations and Pioneer TV Stations," Exhibit D to NAB Comments, *supra* note 4 (Exh. 694).

addition, the Commission itself analyzed the data submitted for its public files in newly-required annual program reports and concluded that stations affiliated with newspapers broadcast more local news, public affairs, and other non-entertainment programming than other stations.[26]

The record also showed that cross-owned newspaper and broadcast stations commonly operate as separate media, with separate and autonomous news, editorial, and sales operations and personnel, and no common editorials, common advertising rates, or joint sales.[27] Despite common ownership, the station and the newspaper compete vigorously for such advertising as is adaptable to both media.[28] These showings were supported by a study demonstrating a lack of correlation

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[26] Second Report and Order at Appendix C (J.A. 230). Two previous studies submitted in support of the proposed rules, which did not have the benefit of the annual program report evidence on which the Commission based its study, had concluded that there was no substantial difference in the programming performance of newspaper-affiliated and non-newspaper-affiliated stations. Comments of Students FCC Study Group, Appendix A (May 17, 1971); H. Levin, "The Policy on Joint Ownership of Newspapers and Television Stations, Some Assumptions, Objectives, Effects."

[27] *E.g.*, Comments of The Washington Post Company *et al.*, (Exh. 732-733); Comments of the Houston Post Company, Channel Two Television Company, and KPRC Radio Company (May 17, 1971) (Exh. 719-721); Comments of Pulitzer Publishing Company, May 17, 1971 at 5-6; Comments of KSL, Incorporated, May 15, 1974 at 4; Supplemental Comments of The Chronicle Publishing Co. and Chronicle Broadcasting Co., May 15, 1974 at 9-10; Comments of WHAS, Inc., May 17, 1971 at 14-15.

[28] *E.g.*, Comments of The Washington Post Company *et al.*, *supra* note 27 (Exh. 732-733); Comments of A. H. Belo Corporation, May 17, 1971, at 8-9 (Exh. 730-731); Supplemental Comments of The Chronicle Publishing Co., *et al.*, *supra* note 27, at 10.

in fact in the news content of cross-owned stations and newspapers.[29]

A number of submissions considered the possible adverse economic consequences of divestiture on the scale proposed.[30] These submissions foresaw a danger that such divestiture could result in a scarcity of available investment capital for broadcasting, with attendant high interest rates, which could adversely affect the service rendered by the new owners of divested stations and the broadcast industry in general.

The Second Report and Order

In evaluating this voluminous record, the Commission began by emphasizing that the proposal for divestiture, "[a]lthough not unprecedented . . . was a departure from the typical Commission approach of limiting any new rules to prospective effect." (J.A. 137, ¶ 5). That proposal, the Commission said, had to be "examined separately" from the prospective rules and tested by different criteria. (*Id.*). In particular, the Commission had to consider "the impact that divestiture would have, taking into account factors not present in connection with prospective rules, . . . which

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[29] J. Anderson, "Broadcast Stations and Newspapers: The Problem of Information Control: A Content Analysis of Local News Presentations" (1971), Exhibit E to NAB Comments, *supra* note 4 (Exh. 639-642); *see also* Comments of Cox Broadcasting Corp. (1971) at Appendices A and B.

[30] *E.g.*, First National City Bank, "Financial and Investment Issues of Forced Divestiture," ANPA Comments, *supra* note 23, Vol. II, Study B; *see also, e.g.*, Frazier, Gross & Co., Inc., "Valuation of Newspaper Owned Television and Radio Stations Affected by The FCC's Proposed Divestiture Rule," ANPA Comments, *supra* note 23, Vol. II, Study A.

must be examined if fairness is to be achieved." (*Id.* at 189, ¶ 99).

The proposed new rules were intended to further the Commission's "longstanding policy of promoting diversification of ownership of the electronic mass communications media." (*Id.* at 138, ¶ 9). That policy is in general designed to promote both "diversity of viewpoints and economic competition." (*Id.* at 189, ¶ 99). The Commission views "diversification of ownership," or what it sometimes refers to as "diversity of control" or "diversity of programming sources," as a tangible means to an "abstract goal" of maximizing the flow of information and argument into "an uninhibited market place of words and ideas in which truth will ultimately prevail . . . ."[31] While separate ownership of separate media does not necessarily increase diversity of content,[32] the Commission presumes that "[t]he divergency of their viewpoints"[33] is ordinarily likely to be greater than under common ownership.

The Commission adopted its prospective rule barring new newspaper cross-ownerships on the basis of this theoretical expectation that the grant of a new license to an applicant other than a local newspaper owner

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[31] Second Report and Order at ¶¶ 9, 10, 108, 110 (J.A. 138-40, 197, 199), *quoting* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[32] It would not do so, for example, where each of the commonly owned media presents a diversity of viewpoints as a matter of policy, or presents a greater volume of information and opinion than would separate owners, or where the separate owners share and promote common economic interests or political views. *See, e.g.*, Comments of Post-Newsweek Stations, Capital Area, Inc. (May, 1974) (Exh. 830-831).

[33] Second Report and Order at ¶ 111 (J.A. 200).

would "add to local diversity." (*Id.* at 191, ¶ 101). In the Commission's view, this was a "worthwhile goal" even if the need for greater diversity was not "urgent," since it could be accomplished without any substantial countervailing harm to the public interest. (*Id.* at 193, ¶ 104). Conceding that "newspapers brought a pioneering spirit to broadcasting" in its early days, the Commission felt "obliged to give recognition to the changes which have taken place . . . ." Now, the broadcast medium had "matured" and become profitable, and newspapers were no longer "the sole reservoir of experience on which reliance has to be placed." Thus, the Commission concluded,

> "the special reason for encouraging newspaper ownership, even at the [presumed] cost of a lessened diversity, is no longer generally operative in the way it once was." (*Id.* at 190, ¶ 100).

Where divestiture of existing cross-ownerships was concerned, however, the "abstract goal" of diversity, while no less important, was no longer "the only point to consider." (*Id.* at 197, ¶ 108). The additional public interest considerations presented by the divestiture proposal included not only the "matter of fairness," but also the potential adverse consequences that broad-scale divestiture might have on broadcast service. The Commission expressed concern that "[r]equiring divestiture could reduce local ownership . . ."; that the "continuity of operation would be broken" and the divested owner's "[l]ong knowledge of the community" would be lost; and that "local economic dislocations" and increased interest rates for broadcast capital might occur "as a result of the vast demand for equity capital. . . ." (*Id.*)

The Commission focused particularly on the loss of the unusual continuity of meritorious service exhibited by newspaper-affiliated licensees. "[S]tability and continuity of ownership," it said, "do serve important public purposes." In the case of newspaper-related stations, "[t]raditions of service were established and have been continued," leading in many cases to an exceptionally "long record of service to the public." (*Id.* at 197-98, ¶ 109). As a group, newspaper-affiliated broadcast stations "show an undramatic but nonetheless statistically significant superiority . . . in a number of program particulars." (*Id.* at n.26). Moreover,

> "[e]ntrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas." (*Id.* at 197-98, ¶ 109).

Divestiture of such ownership "introduces the possibility of disruption for the industry and hardship for individual owners." (*Id.* at 198).

To justify these adverse consequences, the Commission concluded that a more compelling and unambiguous showing of need was required than the mere "hope or expectation that a change in ownership would bring public benefits." (*Id.* at 196-97, ¶ 108). Accordingly, the Commission set out to determine whether there was an actual need for divestiture in cross-ownership markets apart from the presumed value of maximum diversification of ownership, sufficient to justify divestiture under these circumstances. After reviewing the record (which contained no such showing of need [24]), the Com-

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[24] *See generally supra*, pp. 9-10. There was, for example, no showing of a pattern of abuses of cross-ownership by existing cross-

mission concluded that divestiture should be required only where it appeared from the ownership structure in the market that there might be a lack of "real community-wide diversity . . . on . . . topics of local concern." (*Id.* at 203, ¶ 112).

The Commission found such a prima facie threat to diversity in 16 markets where either the only newspaper and television station, or the only newspaper and radio station in a market not served by a television station, are commonly owned. In these "egregious cases," notwithstanding the availability of other media, the Commission concluded that there was no "single full-fledged choice . . . available . . . ." In that sense, the cross-ownership in such a market had "an effective monopoly in the marketplace of ideas as well as economically." (*Id.* at 203).

On the other hand, in markets where a newspaper cross-ownership faces full-fledged direct broadcast competition in addition to the other sources of diversity, there was no such prima facie lack of either diversity or competition. In these circumstances, the Commission concluded that to order divestiture "regardless of competition" was "not warranted on the record before us and would cause serious public injury." (*Id.* at 201,¶ 112 n.29). Likewise, the Commission found no occasion to require divestiture of television-radio cross-ownerships in any market. (*Id.* at 214, ¶ 125).

The Court of Appeals Decision

In the Court of Appeals, several petitions challenged the prospective rules barring new newspaper cross-

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owners, and the Commission noted that it had not been "offered . . . specific data in this proceeding on which to rely in applying antitrust standards." Second Report and Order (J.A. 201, ¶ 112 n.29.)

ownership on the grounds that they were unconstitutional, unauthorized, or unsupported by the record. The court rejected these contentions and affirmed the rules as appropriate applications of the Commission's diversification policy. (J.A. 362-88).

While no party disputed the decision not to order divestiture for existing radio-television combinations, Respondents National Citizens Committee for Broadcasting and the Antitrust Division filed petitions attacking the Commission's grandfathering of most existing newspaper cross-ownerships. The burden of these petitions was that the Commission should have given greater weight to diversity and less weight to the consequences of divestiture in considering whether the public interest requires the breakup of previously approved television-newspaper cross-ownerships.

The court's opinion not only accepts these arguments but goes beyond them. The court holds that there was no rational basis for treating existing cross-owners differently from new applicants. It therefore concludes that a general divestiture was required for both television-newspaper and radio-newspaper cross-ownerships alike. And having reached its own decision on the merits of the public interest question presented, the court does not confine its holding to a remand for the public interest balance to be reconsidered or redrawn by the Commission. Instead, it concludes that the Commission must adopt "a presumption against cross-ownership" and on remand must follow a "policy of giving diversity of media ownership *controlling* weight." (J.A. 426, 443) (emphasis added).

This holding is not based on any dispute with the Commission's conclusion "that the factual case for broad-scale divestiture had not been made." (*Id.* 411).

The court finds the record "essentially inconclusive" as to any actual negative effects on the public interest attributable to newspaper cross-ownership in general or to existing cross-ownerships in particular. (*Id.* 414). Therefore, it says the question before the Commission turned "primarily on policy, not factual considerations." (*Id.* 396, footnote omitted).

As a matter of policy, the court holds that the Commission erred "in refusing to order divestiture in the absence of a showing of tangible public interest harm." (*Id.* 415). In the court's view, the Commission should have adopted a "presumption that cross-owned stations do not serve the public interest." (*Id.* 417). This presumption is said to find "support" in the Commission's obligation under the Communications Act to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), (J.A. 29), in the "policies of the First Amendment" favoring diversity, and "perhaps most importantly, [in] the Commission's long-standing policy . . . that diversification of media sources is of central importance." (*Id.* 417-18, footnote omitted).

On the question of retroactive application of the Commission's new cross-ownership policy, the court notes that, under the Communications Act, broadcast licensees have no "vested right" in their licenses, and may be denied renewal if the Commission determines that the public interest so requires. (*Id.* 416). The court disparages each of the Commission's other countervailing policies and values as unpersuasive or unimportant. The policy favoring local ownership is dismissed as "of little concern to the Commission" (*id.* 419); in any event, the court finds no reason to suppose that local ownership will be reduced by divest-

ing the licenses of newspaper cross-owners. (*Id.* 420-21). The court decides that the loss of the unusual continuity of operation provided by newspaper cross-owners is of negligible significance. (*Id.* 421-23). It discounts the Commission's findings that existing newspaper-related television stations have superior programming, because "the Commission did not *stress* this superiority in deciding to grandfather most stations," and because "comparing amounts of programming types aired . . . would . . . seem to be a crude measure of the public interest." (*Id.* 399) (emphasis added). It rejects the possibility that a mass divestiture could result in a shortage of broadcast capital, on the ground that the same shortage could result from voluntary sales which the Commission permits. (*Id.* 425).

All the Commission's countervailing concerns, the court concludes, reflect "lesser policies" than diversity. (*Id.* 427). In addition, they are not supported by factual showings in the record that breaching these policies would entail actual harm to the public interest. (*See id.* 413-14, 426-27). "In sum, the Commission could not have rationally concluded that [they] . . . justified grandfathering absent a show of harm," or that "their potential impairment overcame the presumption against cross-ownership." (*Id.* 426, footnote omitted). Divestiture is therefore required except in special cases "where the evidence clearly discloses that [a] cross-ownership is [affirmatively] in the public interest." (*Id.* 431).

Finally, the court holds that even if the Commission could properly grandfather existing newspaper cross-ownerships, the decision to order divestiture in sixteen markets where cross-ownerships were found to have an

"effective monopoly" was irrational and could not stand. The court finds no support in the record for "the conclusion that divestiture would be more harmful in the grandfathered markets than in the sixteen affected markets," or that there was a compelling need for divestiture in the latter markets. And it appears to conclude that in those markets the Commission could not rely on the presumptive expectation that increasing the number of separate media owners will increase the diversity of viewpoints expressed. (*Id.* 429-30).[25]

In a subsequent opinion on a motion to stay the mandate pending this Court's review, the Court of Appeals left no doubt that it had instructed the Commission to adopt a rule on remand, subject to a waiver provision for exceptional cases. Having affirmed the prospective ban on *new* newspaper cross-ownerships, the court said its decision had "ordered the Commission . . . to ensure that *everyone* [will] be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure. . .)." (*Id.* 443) (emphasis added).

SUMMARY OF ARGUMENT

This Brief is submitted in support of the Commission's decision that the public interest does not require general divestiture of existing newspaper cross-ownerships. Under the applicable standards of appellate re-

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[25] The Court said:

"Although the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater. The Commission 'must do more than enumerate factual differences, . . . it must explain the relevance of those differences to the purposes of the Federal Communications Act.' [Citation omitted]." (J.A. 429-30).

view, the central question is whether, as the Court of Appeals concluded, this view of the public interest is irrational in light of the record. In fact, the decision to grandfather most of the cross-ownerships repeatedly approved by the Commission in the past is solidly grounded in established, judicially-recognized Commission policies and in rational public interest concerns. Since there is no possible dispute as to the lawfulness of existing newspaper cross-ownership under the Communications Act, the Court of Appeals exceeded its authority in reversing the Commission and, a fortiori, in requiring the Commission on remand to order general divestiture.

For 40 years, the Commission has consistently found individual newspaper cross-ownerships to be in accord with the public interest under the Communications Act. The question in the present rule-making proceeding was whether this established view of the public interest should now be changed. Despite an exhaustive record and the participation of a number of opponents of cross-ownership, there was no showing of changed circumstances supporting a change of policy, and no showing of recurrent abuses of cross-ownership or other actual harm to the public interest calling for regulatory relief. Instead, the case for divestiture rested on the Commission's long-standing presumption that diversification of ownership serves the public interest because it is likely to result in greater diversity of information and viewpoints in the marketplace of ideas—a venerable policy which has not heretofore precluded the licensing of newspaper cross-owners. Accordingly, the Commission could reasonably have concluded that no change at all in its policy toward newspaper cross-ownership was required.

The fact that the Commission nonetheless decided in its discretion to change policy on a prospective basis as applied to applications for new licenses does not affect the rationality of its decision not to change its renewal policy as applied to existing licensees. The question presented by the Commission's divestiture proposal is quite different from the question whether newspaper applicants for a new license, who have long been disfavored as against other qualified applicants, should now be wholly excluded. The Commission's established general licensing policy distinguishes sharply between the standards applied in selecting among applicants for new licenses on the one hand, and the evaluation of renewal applications submitted by existing licensees on the other. The principal ground of the distinction has been that, in the Commission's view, a station's past record of actual performance provides a better basis for predicting the quality of future service to the public than do the abstract predictive criteria, such as the presumption disfavoring cross-ownership, that are applied where only new applicants are involved.

Moreover, like other administrative agencies, the Commission has discretion in changing policy to grandfather relationships established under the prior policy unless convinced that the public interest requires it not to do so. Grandfathering is a commonplace of both statutory legislation and legislative rule-making by administrative agencies, reflecting a general bias of the legal system against retroactive legislating. It has been routinely practiced by the Commission itself in adopting new rules, including rules designed to diversify broadcast ownership. Grandfathering is the preferred approach for administrative agencies because it avoids

disruption of established arrangements and disappointment of expectations built on prior policy. Thus, the Commission's decision to grandfather in this case required no special justification.

In the absence of a concrete showing of need for divestiture, the Commission's decision to grandfather is also rationally supported by the several specific adverse effects on broadcast service that the Commission believed were potential consequences of broad divestiture—the loss of the continuity of meritorious service provided by newspaper cross-owners as a group, the possible loss of meritorious local ownership, and the possibility that new owners would confront a scarcity of broadcast capital in the wake of a general divestiture. There is specific support in the record for the possibility that each of these consequences could occur. Indeed, the loss of exceptional continuity of ownership, on which the Commission placed primary reliance in furtherance of a long-standing Commission policy, is certain to occur.

In these circumstances, the court exceeded its authority in reversing the Commission's decision to grandfather. The Commission violated no law in reaching that decision; it merely decided to continue doing what it has lawfully done for more than 40 years. The court's dispute with the Commission is wholly one of policy as to the relative weight to be given to the pertinent considerations that the Commission rationally took into account. Accordingly, apart from the plain error of instructing the Commission as to what public interest conclusions it must reach on remand, the court improperly substituted its judgment for that of the Commission on a question of public interest policy.

Even though the Commission's decision to grandfather save in exceptional cases is thus free of error, there remains a possible separate question as to the exceptional cases in which divestiture is required. The decision to order divestiture where a cross-ownership has an "effective monopoly" of major mass media addressing local issues in its market was not based on any record showing of need, but on the Commission's judgment that in such markets there is a prima facie danger of inadequate diversity or anti-competitive market conditions. That conclusion, although not required, was not irrational. In any event, it does not affect the validity or rationality of the policy determination to grandfather except where such a prima facie danger is recognized.

For these reasons, the decision of the Court of Appeals should be reversed, and the Commission's grandfather rules should be affirmed.

ARGUMENT

I. THE COMMISSION RATIONALLY CONCLUDED THAT THE PUBLIC INTEREST DOES NOT REQUIRE WHOLESALE REVERSAL OF ESTABLISHED COMMISSION POLICY TOWARD LONG-APPROVED NEWSPAPER CROSS-OWNERSHIPS.

As posed by the Court of Appeals, the question presented by the Commission's decision not to order general divestiture for existing newspaper cross-ownership is

> "whether the agency decision is rational and based on consideration of the relevant factors, *Citizens to Preserve Overton Park* v. *Volpe,* [401 U.S. 402, 416 (1971)] . . . ; *Bowman Transportation* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974); whether, in terms of the APA, the

> agency decision is arbitrary and capricious." (J.A. 394).

The court did not fault the Commission for any failure to take account of relevant public interest considerations. Nor did it dispute the Commission's evaluation of the evidence of record.[26] Instead, it held that the Commission's policy choice was irrational—that "the Commission could not have rationally concluded that the competing policies it offered justified grandfathering absent a showing of harm." (J.A. 426).

The Commission's decision to grandfather existing cross-ownerships in all but exceptional cases was in substance a decision not to change its overall policy toward previously-approved cross-ownerships in the absence of an affirmative showing of need. That decision, rational on its face, reflects the Commission's established general licensing policy. Moreover, grandfathering in the absence of a showing of affirmative need for a retrospective policy change is routine practice at the Commission and in legislative rule-making generally, and requires no special justification. The Commission's decision is also fully supported by the specific adverse public interest consequences for broadcast service identified in its opinion. In sum, the justification for the decision to grandfather is so ample that the more substantial question on the record of this proceeding is whether a decision *not* to grandfather could be rationally explained.

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[26] See J.A. 411-15.

A. Neither the Record Nor the Court of Appeals Opinion Identifies Any Change of Circumstances Requiring a Change In Long-Standing Commission Policy.

The Communications Act authorizes the Commission to grant and renew licenses for broadcast facilities if it finds that public interest, convenience, or necessity will be served thereby. 47 U.S.C. § 307(a), (d) (J.A. 29-30). Under this standard, broadcast licenses are granted initially for a three-year term and must be renewed every three years thereafter.

Since the Communications Act was passed in 1934, the Commission has granted and triennially renewed broadcast licenses for daily newspaper owners publishing in the city of license. By 1955, with the benefit of the Commission's early affirmative encouragement, there were 127 television-newspaper cross-ownerships,[37] of which some 79 remained in 1974.[38] There have been larger numbers of radio-newspaper combinations throughout the life of the Commission.[39] In its repeated renewals of the licenses of cross-owned stations over the years, the Commission has made literally thousands of separate findings that the licensing of such cross-ownerships serves the public interest, convenience, and necessity under the Act.

Nor is the present proceeding the first time the Commission has considered treating the question of newspaper cross-ownership by general rule. In 1943, at a time when the Commission had begun to adopt rules

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[37] J. Udell, *supra* note 23, p. D-27.

[38] Second Report and Order ¶ 112 n.29 (J.A. 201). The number of newspaper-television cross-ownerships has been further reduced since the record was closed.

[39] *See* C. Sterling, *supra* note 22 (Exh. 682-687).

limiting common ownership of broadcast media in the same market in order to promote diversity,[40] it examined that possibility at length and decided "not to adopt any general rule with respect to newspaper ownership of radio stations." [41]

In short, the question presented for public comment by the Commission's Further Notice in this proceeding was scarcely one of first impression. The question was whether the Commission's policy of approving newspaper cross-ownership as consistent with the public interest, spanning the 40 years of the Commission's existence, should now be changed.

1. The Commission Was Not Required to Make Any Change in Its Policy.

The Commission does have discretion to change policy in the light of changed circumstances or evolving perceptions of the public interest. In some instances, a change of even firmly established policy could be effectively compelled by new developments affecting the public interest. But the established policy presumptively defines the public interest until a need for change has been shown. And it is the change of established policy, not its continuation, that requires special justification.[42]

Curiously, the opinion of the court below makes no attempt to explain why a change of Commission policy

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[40] *See infra* p. 38.

[41] Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944).

[42] *See* Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

was required. The court dismisses the record evidence on the actual effects of newspaper cross-ownership as "essentially inconclusive" and irrelevant to the proper disposition of the case. (J.A. 414). On an inconclusive record, the court holds that the Commission's long-standing public interest objective of diversifying broadcast ownership must control. It neither asks nor answers why this objective must *now* control the question of newspaper cross-ownership, when the Commission has until now consistently concluded that it does not. The court has, in effect, treated the Commission's notice of rule-making proposing a change in its cross-ownership policy as if it were a decision establishing the policy it proposed for consideration. The Commission's eventual decision not to change policy is thus transformed in the court's opinion into a decision to make a change that requires some special showing.[43]

In fact, the record before the Commission contained no showing of diminished diversity, decreased competition, or any other new developments suggesting, much less requiring, that previously approved cross-ownerships should now be condemned.[44] Nor did the Commission find any pattern of abuses or other adverse consequences of existing cross-ownership pointing to a previously unperceived need for remedial action. It concluded—and the court agreed—that the case for ending newspaper cross-ownership rested wholly on the theoretical public interest gain to be "hoped for or expected" from broadcast diversification.[45] And nothing in

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[43] *See* J.A. 418-19.

[44] *See supra* pp. 9-10, 16.

[45] *See supra* pp. 16, 19.

the record as assessed by the Commission or by the court shows that gain to be greater now than it was for the 40 years when the Commission consistently found that it was not enough. There are now, in fact, more separate broadcast and newspaper owners in cross-ownership markets than before.[46]

2. The Commission's Decision to Change Policy Prospectively Does Not Affect Its Discretion Not to Change Its Renewal Policy.

The Commission decided, in its discretion, to make a change in its newspaper cross-ownership policy as applied prospectively to new applicants. It did so, not because it saw a new or urgent need, but expressly because it believed that the "special reason for encouraging newspaper ownership, even at the [presumed] cost of a lessened diversity, is no longer generally operative in the way it once was."[47] While that decision was not compelled by anything in the record, this Brief proceeds on the assumption that it was within the Commission's public interest discretion.[48] Whatever its merits, that decision neither affects the Commission's discretion to decline to change its policy toward renewal of existing licensees, nor relieves the Commission of the necessity of justifying any such change it might order.

The Commission's stated reason for its prospective policy change, *i.e.*, the increased availability of other qualified license applicants now that the risks attached to broadcast investments have diminished, has no ap-

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[46] *See supra* p. 11.

[47] Second Report and Order ¶ 100 (J.A. 190).

[48] If the prospective ban is unlawful, the grandfather issue would of course be moot.

plication to the question whether renewal of the licenses of incumbent cross-owners must now be deemed generally contrary to the public interest. As the Commission has long recognized, decisions on license renewal applications present a quite different public interest question than decisions on applications for new licenses. In both types of decisions, the Commission must predict how the applicant would operate its station during the ensuing three-year license term. But as the Court of Appeals has noted:

> "[A]lthough in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion." *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966)."

Where an applicant for a new license is involved, the forecast must rest heavily on presumptions arising from various predictive considerations that the Commission has developed for want of a record of factual performance on the station in question.

This distinction is most sharply defined in the Commission's treatment of comparative licensing proceedings, in which more than one applicant seeks the same license. These proceedings are of two kinds: those in which only new applicants are involved, and comparative *renewal* proceedings in which one of the applicants is an incumbent licensee. The Commission chooses among *new* applicants on the basis of a series of predictive presumptions codified in a 1965 *Policy State-*

" *See also* KFKB Broadcasting Ass'n, Inc. v. Federal Radio Comm'n, 47 F.2d 670, 672 (D.C. Cir. 1931).

ment on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). The foremost of these is the presumption underlying the Commission's ownership diversification policy—that diversification of ownership will result in greater diversity of information and opinion. A second set of presumptively beneficial characteristics includes local ownership and integration of local ownership with station management, participation by the licensee in the civic affairs of the community, and the applicant's past broadcast record with other stations and communities. But these criteria are not applied in the same way to comparative renewal proceedings. Where a renewal applicant is involved, the Commission looks principally at the record, and a record of proven meritorious service in the public interest will ordinarily be controlling.[50]

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[50] *See* Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, —— F.C.C.2d ——, 40 P&F Radio Reg. 2d 763 (1977); Cowles Florida Broadcasting, Inc., 62 F.C.C.2d 953, 955-57 (1977), *appeal pending,* Central Florida Enterprises Inc. v. FCC, D.C. Cir. No. 76-1742; Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970), *rev'd,* Citizens Communications Center v. FCC, 447 F.2d 1201, 1214 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854-55 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971), *rehearing denied,* 404 U.S. 877 (1971).

In 1970, the Commission articulated this long-standing fundamental difference in its treatment of comparative renewal applicants in the formal Policy Statement Concerning Comparative Hearings cited in the preceding paragraph of this footnote. That 1970 Policy Statement also eliminated comparative hearings altogether on competing applications if the incumbent established that it had a record of substantial performance in the public interest and had not been guilty of serious infractions of applicable laws or Commission rules or policies. The Court of Appeals held this procedure invalid on the ground that the Communications Act requires a full hearing for each applicant. Citizens Communications

The Court of Appeals has previously recognized this basic distinction with approval as applied specifically to newspaper cross-ownership. In *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971), the Commission had granted a license to a new applicant for a station previously operated by a newspaper cross-owner. It had treated the cross-owner as a new applicant, not as an incumbent seeking renewal, because of special circumstances arising from the owner's attempt to exert improper influence at the Commission. Therefore, the Commission decided the case on the basis of the 1965 Policy Statement, *supra*, relying heavily on the criterion of diversification of ownership. The Court of Appeals affirmed expressly on the ground that the cross-owner was properly treated as a new applicant. Had an ordinary and meritorius renewal applicant been involved, the court made clear that the Commission's decision to oust an incumbent newspaper cross-owner on the strength of the Commission's general diversification policy would have presented different and serious questions. *Id.* at 854.

The conclusion of the court below that the Commission's diversification policy requires general divestiture of existing cross-ownerships altogether missed this fundamental distinction in Commission practice between the treatment of renewal applicants and other

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Center v. FCC, *supra*. But despite extensive dicta purporting to tell the Commission what standards to apply in assessing the performance of existing licensees, the court accepted the premise that "incumbent licensees should be judged primarily on their records of past performance." 447 F.2d at 1213. The Commission's present policy continues to reflect that principle. *See* Formulation of Policies Relating to the Broadcast Renewal Applicant *and* Cowles Florida Broadcasting, Inc., both *supra*.

licensing questions. The error may have resulted from the court's apparent confusion about the Commission's licensing policies. At one point the court miscites the 1965 Policy Statement on Comparative Broadcast Hearings, *supra,* as the "1965 Policy Statement on Comparative *Renewal* Hearings." (J.A. 352 n.9) (emphasis added). Elsewhere it states that the 1965 Policy Statement "by its terms . . . applies . . . to comparative renewal hearings" (J.A. 419 n.94), whereas in fact its terms make no reference to renewal proceedings.[51]

Whatever the reason, the court failed to recognize that the proposal to order divestiture for existing cross-owners was a proposal to change a firmly established policy not dependent upon or determined by the Commission's policy toward new applicants. The court thus

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[51] *See* Cowles Florida Broadcasting, Inc., *supra* note 50, 62 F.C.C. 2d at 957.

The court also incorrectly states that the "Commission has applied the *1965 Policy Statement* in noncomparative hearings, although by its terms it is not applicable," citing Seven (7) League Productions, Inc., 1 F.C.C.2d 1597 (1965), and Belo Broadcasting Corp., 47 F.C.C.2d 540 (1974). (J.A. 352 n.9). The statement is wrong in fact and the cited cases do not support it.

The court may have meant to say that the 1965 Policy Statement has been applied in comparative *renewal* hearings, although by its terms it is not applicable to renewals. The cases relied on by the court were cited in briefs as standing for that proposition, and they in fact involved comparative renewal hearings. If that is what the court meant, it was still confused. In the cited cases, the 1965 Policy Statement was applied only to the introduction of evidence. *See* Cowles Florida Broadcasting, Inc., *supra,* at 957 and n.7. In the *Belo* case, the Commission stressed that, on the merits, primary weight is given to the incumbent's past performance. 47 F.C.C.2d at 544. As the Court of Appeals has recognized elsewhere, these cases do not indicate that the Commission applies the substantive standards of the 1965 Policy Statement to incumbent licensees with records of good performance. *See* Citizens Communications Center v. FCC, *supra* note 50, 447 F.2d at 1208-09 n.23.

misperceived the decision to grandfather as a new policy initiative by the Commission to protect existing licensees rather than a decision to continue existing policy in the absence of a demonstrated need for change.

B. The Commission Has Discretion to Grandfather Absent an Affirmative Showing of Public Interest Harm.

Quite apart from the basic distinction between incumbent licensees and new applicants in the Commission's licensing scheme, the decision to grandfather is an exercise of a discretion inherent in the very power to make legislative rules. Grandfathering existing relationships established in reliance on a prior policy that is being changed is a routine regulatory tool for the Commission, for other administrative agencies and for Congress. It is rooted in the empirical tradition of regulatory legislation in the United States and in the fundamental bias of the legal system against retroactive rule-making. It is an intrinsically rational approach that needs no special justification.

1. Grandfathering Is A Routine Commission Practice.

As the Commission said in the *Second Report and Order*,

> "Although not unprecedented, the idea of divestiture of ownership [is] . . . a departure from the typical Commission approach of limiting any new rules to prospective effect." (J.A. 137, ¶ 5).

A retroactive application of new rules so as to require divestiture entails inherent "disruption" and

"hardship," that "must be examined if fairness is to be achieved." (Id. 198, 189, ¶¶ 109, 99).

Although the Commission treated these propositions as self-evident, requiring no citation to authority, they are well supported by Commission precedent. The Commission has often taken account of the "inherently disruptive" consequences of divestiture.[52] It has frequently grandfathered existing non-conforming arrangements when changing policy in a variety of contexts.[53] It has grandfathered, or otherwise accommodated the disruptive consequences of retroactive application, when adopting policy changes specifically aimed at promoting diversification of ownership.[54] The grandfather principle is incorporated in the

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[52] *E.g.*, Report on Chain Broadcasting Order No. 37, Dkt. No. 5060 (1941) at 67; Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953); Distribution of Television Broadcasting Signals by CATV Systems, 2 F.C.C.2d 725, 784-85 (1966); Diversification of Control of CATV Systems, 23 F.C.C.2d 833, 835 (1970).

[53] *E.g.*, Revision of FM Broadcast Rules, 23 P&F Radio Reg.2d 1801, 1836-39 (1962) (adoption of FM table of assignments with grandfathering of existing stations having non-conforming antenna height or broadcast power); Distribution of Television Broadcast Signals by CATV Systems, 2 F.C.C.2d 725, 784-85 (1966), *aff'd sub nom.*, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (rules limiting signal carriage by cable television systems with grandfathering of non-conforming systems already in operation); Cable Television Report and Order, 36 F.C.C.2d 143, 185 (1972), *aff'd sub nom.*, ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975) (revision of cable signal carriage rules with grandfathering of non-conforming existing systems); Interstate and Foreign Message Toll Telephone Service, 57 F.C.C.2d 1216, 1220 (1976); 59 F.C.C.2d 83, 84-86 (1976) (rules on telephone terminal equipment, grandfathering equipment currently in use).

[54] No divestiture was required when the Commission prohibited overlapping service contours between commonly owned stations in

text of the Commission's duopoly rules forbidding ownership of more than one station in each broadcast service (AM, FM, or television) with overlapping service contours.[55] Indeed, in the *Second Report and Order* under review, the Commission again reaffirmed its decision to grandfather all existing radio-television cross-ownerships—which far outnumber newspaper cross-ownerships—prohibited prospectively under the

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each broadcast service, Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 F.C.C. 1476 (1964); or when it adopted policies regarding concentration of ownership in the top 50 markets, Hearings on Applications for Second VHF Station, 3 P&F Radio Reg.2d 909 (1964), Interim Policy on Television Multiple Ownership, 5 P&F Radio Reg.2d 271 (1965), and Multiple Ownership of Television Broadcast Stations, 12 P&F Radio Reg.2d 1501, 1507 (1968); or when it proposed and adopted rules prohibiting television-radio cross-ownership in the same market, 33 Fed. Reg. 5315 (1968) and Multiple Ownership of Standard, FM & Television Broadcast Stations, 22 F.C.C.2d 306 (1970) (J.A. 33).

When the Commission adopted multiple ownership rules limiting the total number of station licenses in each broadcast service permitted to any one owner, it deliberately set the limits high enough to avoid "extensive divestment of holdings by existing licensees," on the ground that "this would be unduly disruptive." Multiple Ownership of AM, FM and Television Broadcast Stations, 18 F.C.C. 288, 292 (1953). Even in the few cases where existing holdings exceeded the new limits, divestiture was not automatic but was to be determined on a case-by-case basis. Amendment of Multiple Ownership Rules, 9 P&F Radio Reg. 1563, 1572 (1953). It appears that hardly any divestiture at all was in fact ordered. *See* Howard, "Multiple Broadcast Ownership: Regulatory History," 27 *Fed. Comm. B.J.* 1, 15 (1974).

See also CATV-TV Cross-Ownership Rules, 55 F.C.C.2d 540 (1975), *appeal pending*, NCCB v. FCC, D.C. Cir. No. 75-1933, where the Commission ordered divestiture of cable systems commonly owned with television stations only in egregious cases, notwithstanding its prospective ban on all future such cross-ownerships.

[55] 47 C.F.R. §§ 73.35 note 8, 73.240 note 8, and 73.636 note 8.

First Report and Order, and no party challenged this sweeping grandfather rule in court.

The only change in the Commission's broadcast diversification rules that has *not* on its face taken account of the special problem presented by retroactive changes is its adoption of the original AM duopoly rules in 1943, prohibiting existing as well as new ownership of more than one AM station in the same market.[56] That decision, however, was preceded by measures addressed to radio duopoly which had only prospective effect. The Commission adopted duopoly rules for FM radio and for television, where no divestiture was required, in 1940 and 1941 respectively; but it did not at the same time adopt any such rules for AM radio, the only broadcast service then generally available to the public and the only service in which there were existing instances of duopoly ownership. Instead, the Commission sought to deal with AM duopoly on a case-by-case basis.[57] The decision to order divestiture, which was not made until nearly three years later, was first proposed only after the Commission had determined in its chain broadcasting investigation that existing network duopoly ownerships were anticompetitive and should not be allowed to continue.[58]

In short, the Commission's grandfathering in the present case, where there was no showing of affirmative need for divestiture, is a consistent application of

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[56] Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943).

[57] Report on Chain Broadcasting, Order No. 37, Dkt. No. 5060 (1941) at 2.

[58] *Id.* at 68.

a well-established uncontroversial approach to rule-making. That approach is peculiarly appropriate as applied to existing broadcast licensees under the Communications Act, since their performance is subject to review and approval every three years in license renewal proceedings. The approach is as rational here as when practiced throughout the Commission's history.

2. The Commission's Practice of Grandfathering Reflects a Basic Principle of the Legal System.

As the Commission's customary approach suggests, grandfathering is a commonplace of American regulatory legislation and administrative rule-making. The principle of prospective application permeates the major federal regulatory statutes. In some cases, entire regulatory schemes have been imposed only on a prospective basis, with all existing relations permanently grandfathered.[39] Where grandfathering is not

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[39] Thus, for example, the Civil Aeronautics Act of 1938 required all air carriers to obtain certificates of public convenience and necessity as a condition of engaging in air transportation, but provided that a carrier which was operating when the Act was passed was entitled to a certificate "upon proof of such fact only . . . unless the service rendered by such applicant . . . was inadequate . . . ." Pub. L. No. 706, 75th Cong., 3d Sess., 52 Stat. 973, 987-88 (1938). The Act thereby effectively grandfathered an entire industry subject to new regulation.

Such industry-wide grandfather exemptions to existing carriers have also been granted to motor carriers, 49 U.S.C. §§ 306, 309; water carriers, 49 U.S.C. §§ 909(a), (f); and freight forwarders, 49 U.S.C. § 1010(a).

Similarly, the comprehensive drug regulatory scheme of the Federal Food, Drug, and Cosmetic Act of 1938 is directed primarily at "new drugs." *See* 21 U.S.C. § 321(p)(1). The original Act grandfathered drugs marketed before the Act was passed. *See*

commanded by the statutes themselves, the regulatory agencies have routinely adopted it in the exercise of their public interest discretion.[60] Such discretionary ad-

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Note, "Drug Efficacy and the 1962 Drug Amendments," 60 *Geo. L.J.* 185, 187 (1971). The 1962 amendments imposing major new regulations on sale and labeling not only preserved much of the original grandfathering of pre-1938 drugs, but also grandfathered some pre-1962 drugs against application of the new standards. Pub. L. No. 87-781, § 107(c)(4), 76 Stat. 789 (1962); Note, *supra*, 60 *Geo. L.J.* at 192 & 195.

See also, e.g., grandfather provisions under the Natural Gas Act, 15 U.S.C. § 717 f (e); the Clean Air Act, 42 U.S.C. §§ 1857 f-1, 1857 f-2, 1857 f-5, 1857 f-5a, 1857 f-6f; the Federal Water Pollution Control Act, 33 U.S.C. § 1316 (applicable only to new sources), § 203(c)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note; and the Newspaper Preservation Act, 15 U.S.C. § 1803 (a), (b).

[60] Much administrative grandfathering is so routine that it is done as a matter of course without specific mention even in agency regulations. At the Food and Drug Administration, this practice of grandfathering in the normal course is now codified in a regulation providing that any

> "action taken or completed in conformity with a guideline [of general applicability promulgated by the FDA] . . . which has subsequently been amended or revoked shall remain acceptable to the Food and Drug Administration unless the Commissioner determines that substantial public interest considerations preclude such continued acceptance." 21 C.F.R. § 10.90(b)(6).

Under this rule, the FDA consistently applies new testing standards for harmful effects of the chemical substances present in the products subject to its regulation only to chemicals first tested after the standard is adopted, unless an affirmative need for retesting is found.

In agencies which have not so codified their routine grandfathering practice, the practice is occasionally referred to in judicial or agency decisions. *E.g.*, South Terminal Corp. v. EPA, 504 F.2d 646, 674 (1st Cir. 1974) and Citizens Ass'n of Georgetown v. Washington, 370 F. Supp. 1101, 1108-09 (D.D.C. 1974) (EPA grandfathering of existing parking spaces under regional air quality control plan); Executive Withdrawal Order, 55 I.D. 205, 210-11 (1935) and Eagle Peak Copper Mining Co., 54 I.D. 251, 255-56 (1933) (Interior Department grandfathering of non-vested interests

ministrative grandfathering is employed even for new health and safety standards, where the importance of the public interests involved is hardly less than a speculative increase in diversity.[61]

When the validity of discretionary administrative grandfathering has been challenged, the courts have

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in public lands upon withdrawal of the lands from public entry).

Sometimes, specific instances of routine grandfathering are embodied in regulations or less formal agency publications. *E.g.*, 33 C.F.R. § 159.12, 40 C.F.R. § 140.3(e) (existing vessels exempt from new EPA standards for marine sanitation devices); U.S. Postal Service, Delivery Service, Filing No. 331-1, Amend. #5, September 29, 1972, as amended by Memorandum on Delivery Policy of Nov. 16, 1976; 20 C.F.R. § 405.415(a)(3)(ii)(a) (HEW cost accounting rules for health-care providers not applicable to "old providers" who remain in medicare program); Export Administration Bulletin No. 161, Oct. 18, 1976, at 9 (Arab boycott rules regarding letters of credit applicable only to new letters).

Prospective application is the recognized common practice of the Internal Revenue Service in adopting new rules that operate to the disadvantage of taxpayers. *E.g.*, Rev. Rul. 77-40, Internal Revenue Bulletin No. 1977-29, July 18, 1977. *See generally* Lesavoy Foundation v. Comm'r, 238 F.2d 589, 591 (3d Cir. 1956); Rogovin, "The Four R's: Regulations, Rulings, Reliance and Retroactivity—A View From Within," 52 *Standard Federal Tax Reports* No. 56 at 16-17 (Dec. 1, 1955); Griswold, "A Summary of the Regulations Problem," 54 *Harv. L. Rev.* 398, 411-18 (1941).

[61] For example, standards restricting water pollution and air pollution imposed on new sources are often applied less stringently to existing sources. *E.g.*, 40 C.F.R. §§ 129.102(b)(3), 129.103(b)(3) (effluent water pollutants); 16 C.F.R. §§ 1201.1(b), 1207.2 (Consumer Product Safety Comm'n standards for architectural glass and swimming pool slides); 33 C.F.R. § 159.12, 40 C.F.R. § 140.3(e) (marine sanitation devices); Air Programs Office, EPA, Region IV, Evaluation of the Georgia Control Strategy, June 21, 1974, revised March 31, 1975, at 2-3; *and see* Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1152 & n.16 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (air pollutant emissions from smokestacks). *See also* the regulation of the Food and Drug Administration cited in note 60, *supra*.

routinely upheld it,[43] just as they have routinely sustained statutory grandfathering schemes against claims that they are irrational classifications violating constitutional requirements of equal protection or due process.[44] But the rationality of grandfathering where there is no compelling need for change is so obvious and so basic to the legal system that it has seldom been challenged. As this Court has recognized, the freedom to change course on a prospective basis, without prejudice to established expectations based on prior policy, is an essential element in the legislative and rule-making process. *United States* v. *Maher*, 307 U.S. 148, 153 (1939). Prospective rules permit the rule-maker to respond to "the felt need for regulating . . . through familiar administrative devices, while at the same time . . . [satisfying] the dictates of fairness by affording sanction for enterprises theretofore established." *Id.*[45]

Moreover, the prevalence of grandfathering reflects a broader bias of the legal system against the

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[43] *See* South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 674 (1st Cir. 1974); Citizens Association of Georgetown v. Washington, 370 F. Supp. 1101, 1108-09 (D.D.C. 1974).

[44] *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303-06 (1976) (per curiam); Stanley v. Public Utilities Commission, 295 U.S. 76 (1935) (per curiam); Watson v. Maryland, 218 U.S. 173, 178 (1910).

[45] *See also* Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967).

When an agency acts prospectively, it has broad discretion to experiment, innovate, or change direction. *See* Amoco Oil Co. v. EPA, 501 F.2d 722, 734-35 (D.C. Cir. 1974); Frontier Airlines, Inc. v. CAB, 439 F.2d 634, 640 (D.C. Cir. 1971); Connecticut Committee Against Pay TV v. FCC, 301 F.2d 835, 837-38 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962); American Airlines, Inc. v. CAB, 192 F.2d 417, 421 (D.C. Cir. 1951).

presumptive unfairness of most retroactive lawmaking. "Retroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r*, 323 U.S. 141, 164 (1944)."[65] Retroactive laws are sometimes held unconstitutional.[66] When statutes are ambiguous as to whether they are to apply retroactively, they are "presumed, in the absence of clear expression to the contrary, to operate prospectively," *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938); *Place* v. *Weinberger*, 497 F.2d 412, 414 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974). Responding to the same perception of the potential unfairness of retroactive application, the courts have sometimes forbidden agencies to give new rules retroactive effect.[67] And to avoid retroactivity, agencies are, as a general matter, expected insofar as possible to make policy through the "quasi-legislative promulgation of rules to be applied in the future," rather than by adjudication. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

The Court of Appeals concluded that the Commission was not precluded from applying its new rules

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[65] *See also* Story, *Constitution* § 1398 (1891):

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

[66] *E.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Coombes v. Getz, 285 U.S. 434 (1932).

[67] *See, e.g.*, Coe v. Secretary of HEW, 502 F.2d 1337, 1340 (4th Cir. 1974); Retail Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); International Business Machines Corp. v. United States, 343 F.2d 914, 921-23 (Ct. Cl. 1965) *cert. denied*, 382 U.S. 1028 (1966); NLRB v. E&B Brewing Co., 276 F.2d 594, 600 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

retroactively so as to require divestiture, because broadcast licensees under the Communications Act do not have any vested right to their licenses after the expiration of the three-year license term (J.A. 416). This conclusion overlooks the "legitimate expectancies of renewal" which the Court of Appeals has elsewhere recognized may arise from a meritorious record of broadcast service.[48] And it does not even speak to the proposition that retroactive application, though not forbidden, may rationally be eschewed by the Commission as a matter of policy. The bias against disappointing expectations and disrupting arrangements based upon existing law or policy is not confined to cases where it is constitutionally compelled.

This is not to suggest that grandfathering is invariably practiced by administrative agencies. On a sufficient showing, an agency may even have a duty to apply new policy retrospectively in order to carry out its statutory mandate.[49] But a decision to grandfather absent a showing of need for retroactivity is self-justifying. It is a decision *not* to grandfather that calls for affirmative support. Until the decision of the Court of Appeals in this case, to our knowledge no court has suggested that there is a presumption *against* grandfathering or that grandfathering must be specially explained. The presumption runs the other way.

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[48] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *rehearing denied*, 404 U.S. 877 (1971); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n. 9 (D.C. Cir. 1976).

[49] *See* Joseph v. FCC, 404 F.2d 207, 211-12 (D.C. Cir. 1968).

C. The Decision to Grandfather Is Also Rationally Supported by the Specific Harmful Consequences Feared by the Commission.

In declining to order a general divestiture of newspaper cross-ownerships, the Commission also relied on three potential adverse consequences of general divestiture in this case for broadcast service to the public, the Commission's overriding public interest responsibility. These concerns provide independent rational justification for the decision to grandfather.

1. CONTINUITY OF SERVICE

The Commission's primary concern was the loss of exceptional continuity of service provided by newspaper cross-owners as a group, that would result from divestiture.[70] The record shows that, unlike various other broadcast pioneers, newspaper owners who became licensees in the early days of broadcasting have typically displayed a long-term commitment to providing broadcast service in their community of license, regardless of either hardships in the early years of operation or subsequent opportunities to sell their stations at large profits.[71] At the time of the Commission proceeding, over 80 per cent of the television stations established by newspaper owners before 1948 were still being operated by the original owners. In contrast, nearly half the other stations originated before 1948 had been sold by the original licensee—the majority within five years of the start of broadcast service.[72] The continuity of newspaper

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[70] *See supra* p. 16.

[71] *See generally* Robbins, *supra* note 25 (Exh. 694).

[72] *Id.* (Exh. 710-712). A similar pattern is evident among the early newspaper and non-newspaper owners of radio stations. *Id.* (Exh. 707-710).

ownership and the commitment it commonly reflects, would be permanently ruptured by divestiture.

The importance of continuity to the Commission is related to the premise of the licensing scheme established by the Communications Act. That scheme places licenses to broadcast in the hands of the owners of a multitude of local stations rather than of a few central national outlets. The theory is that local stations will provide a broadcast service tailored to the peculiar needs of local communities. Continuity of service by a licensee over a particular station enables the broadcaster to develop a knowledge of his community and its needs and an expertise in meeting those needs through broadcast service. The Commission's experience has demonstrated that "time is needed to fully or substantially implement" a licensee's proposals for a broadcast service attuned to the needs of the community, "to gain a better understanding of the program needs and desires of the community, and to adjust programming to such needs and interests."[73]

In part, the Commission places special value on long continuity of service because it is exceptional. The high rate of turnover of broadcast licenses has long been a source of Commission concern. It raises the "important public interest question of whether numerous communities throughout this country are being deprived of the benefits which [the Commission] believe[s], based upon [its] experience, come from sustained station ownership."[74] Because of this concern

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[73] Procedures on Transfer and Assignment Applications, 32 F.C.C. 689, 690 (1962).

[74] *Id.*

at the high rate of turnover of broadcast licenses, in 1960 the Commission adopted a rule requiring a full hearing to justify a license transfer during the first three-year license term."[75]

In disparaging the substantiality of this Commission policy, the Court of Appeals argued that it was irrational to be concerned about disrupting continuity, since the Commission permits substantial license turnover by "routinely approving license assignments." (J.A. 423). But the question whether to forbid transfers by licensees who have in fact lost interest in rendering a broadcast service over their stations is quite different from the question whether those licensees who do exhibit a voluntary long-term commitment should be highly prized. Although the Commission has not believed it desirable to lock in licensees who do not wish to continue after three years, the resulting turnover accentuates rather than diminishes the importance of preserving exceptional continuity where it is found.

The court also argued that "a one-time alteration of the ownership structure of the broadcast industry should not effect [sic] the public's interest in quality programming," because the new owners could develop records of continuity of their own which the Commission would presumably not terminate by di-

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[75] 47 C.F.R. § 1.597; Notice of Proposed Rule-Making, 25 Fed. Reg. 12898 (1960). Besides the concern about preserving the benefits of "sustained station ownership," the three-year rule was designed to discourage "trafficking," *i.e.*, the practice of obtaining a broadcast license with the intent to sell it at a profit rather than to provide a broadcast service. *See* Procedures on Transfer and Assignment Applications, *supra* note 73, 32 F.C.C. at 689-90.

vestiture (J.A. 422). This argument discounts the years required for a successor to achieve a comparable expertise in providing a broadcast service responsive to community needs. That aside, the Commission had reason to believe that a non-newspaper successor is far less likely to develop a comparable record of continuity or display a comparable commitment to local broadcasting. The special broadcast service that newspaper owners as a group are able to provide will not be speedily replaced, and may well not be replaced at all.

The importance of continuity is enhanced in the case of newspaper cross-owners because of the quality of the stability of ownership they provide. As the Commission recognized, these licensees have developed "traditions of service" grounded in something more than purely commercial considerations.[76] According to the Commission's programming study, they devote more time to news, public affairs, and other types of programming that the Commission deems valuable to the public interest than do stations not affiliated with newspapers.[77] In short, beyond the fruits of continuity itself, these licensees as a group offer other benefits resulting from the commitment to local broadcast service that causes them to stay.

2. Local Ownership and Economic Dislocation

In addition to the certain loss of continuity of service by meritorious licensees, the Commission also briefly adverted to a possible loss of local ownership and possible economic dislocations as potential adverse conse-

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[76] Second Report and Order at ¶ 109 (J.A. 197).

[77] *Id.* at 198, ¶ 109 n.26.

quences of a general divestiture. Both these concerns are rationally based. Most of the existing newspaper cross-ownerships are locally owned; in the event of divestiture "many sales would have to be to outside interests," [78] the court's speculation to the contrary notwithstanding. (J.A. 421). The Commission's concern about possible economic dislocations is directly supported by showings in the record.[79] While these concerns are of relatively peripheral importance in the Commission's opinion, together with the lost continuity of meritorious ownership that would result from divestiture they constitute a sound basis for the Commission's conclusion that general divestiture should not be ordered in the absence of an affirmative showing of need.

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The Court of Appeals held the Commission's grandfathering decision irrational. It was, instead, so clearly rational that it did not require elaborate explanation. The Commission's summary explanation is, if anything, more than was needed. Its approach was rational as a decision not to change long-established policy without a showing of changed circumstances or previously

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[78] *Id.* at 197, 178-79, ¶¶ 108, 78.

[79] In reviewing the record, the Commission took note of several submissions which sought to show that "new owners of divested stations would face significant economic burdens, principally as a result of paying high prices for broadcast properties that have appreciated greatly over the years." According to these submissions, "because of high interest rates, the cost of debt service will reduce the working capital and profit accumulation which would otherwise be available for programming. . . ." *Id.* at 177-78, ¶ 77. Economic studies included in the record also concluded that in the event of a general divestiture of newspaper-related stations, "in many instances the price will remain too high to service the debt capital necessary to purchase a station." *Id.* at 167, ¶ 57.

unperceived need; rational as a reflection of general Commission licensing policy toward incumbent licensees with records of performance in the public interest; rational as a routine administrative decision to grandfather when adopting new policy where no affirmative showing to support retroactive application has been made; and rational as well on account of the potential adverse consequences of divestiture for broadcast service which the Court of Appeals sought to disparage.

II. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN REVERSING THE COMMISSION'S DECISION TO GRANDFATHER.

Since the Commission's decision that general divestiture of newspaper cross-ownerships is not required was plainly rational, the Court of Appeals exceeded its authority in holding the decision invalid. Whatever the precise formulation of the applicable standard of review, a reviewing court is required to affirm an agency decision that has a rational basis unless the decision contains errors of law or is not "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).[80]

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[80] *See also* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940); K. Davis, *Administrative Law of the Seventies*, § 29.01 (1976).

In *Citizens to Preserve Overton Park*, this Court articulated the appropriate standard of review for agency rule-making under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A):

> "Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to sub-

There is no claim that the Commission failed to take account of any relevant public interest considerations, and its grandfather decision is fully consistent with all pertinent requirements of law.

The Court of Appeals does not suggest that newspaper cross-ownership is forbidden by the Communica-

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stitute its judgment for that of the agency."

The statement that a court must consider "whether there has been a clear error of judgment" does not mean that a court may reverse an agency merely because the court disagrees with the agency's ruling. For "(t)he court is not empowered to substitute its judgment for that of the agency." Rather, the "clear error of judgment" language shows only that the agency's action must have a rational basis.

This principle has been formulated in a variety of ways. *See* Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974), *rehearing denied*, 420 U.S. 956 (1975) ("we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more"); Ethyl Corp. v. EPA, 541 F.2d 1, 34-36 & n.74 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976) ("(t)he immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors . . . It is settled that we must affirm decisions with which we disagree so long as this test is met.") (emphasis in original); NAITPD v. FCC, 516 F.2d 526, 542 (2d Cir. 1975) ("Public policy is not like a single track where only one train can run at a time. 'The court's responsibility is not to supplant [a] Commission's balance of . . . [competing] interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.' . . ."); First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975) (" 'Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis' . . . Something more than mere error is necessary to meet the test. . . . To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was 'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case . . . .' ")

tions Act or any other law. No such claim would be tenable under the Communications Act in the face of the Commission's repeated determinations to the contrary in approving cross-ownerships throughout the 40-year life of the Act. This consistent, judicially recognized, administrative construction of the statute by the agency charged with its enforcement is conclusive on the question of legality.[81]

The court does appear to conclude that a presumption against existing cross-ownership is recognized in Commission policy and "supported" by the Communications Act and "policies of the First Amendment" (J.A. 417). No cases are cited in support of that presumption; the court relies instead on the Commission's rhetorical declaration—which the court itself concedes cannot be taken literally—that "nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible."[82] But in the case of existing cross-ownerships, any such presumption in Commission decisions is belied by the Commission's established policy of approving such cross-ownerships over the years. The Commission does not presume that its long-standing consistent policy is wrong.

Promoting diversity of information, opinion and ideas is an important element of the public interest under the Communications Act. The Commission's opinion gives expansive recognition to the importance of that objective. Its prospective rules, as well as its

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[81] *See, e.g.*, Youakim v. Miller, 425 U.S. 231, 235 (1976); NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

[82] J.A. 418, quoting *Second Report and Order*, ¶ 111, J.A. 200.

limited divestiture order, are based upon it. But as shown above, the Commission has never regarded diversification of ownership in the hope of maximizing diversity as controlling on the ultimate public interest question of whether continued licensing of existing meritorious ownerships will provide the broadcast service best attuned to the public interest. The court simply misunderstood the Commission's general licensing policy and ignored its long-standing practice of grandfathering even when adopting new policies designed to promote diversity.[83]

The court's basic disagreement with the Commission is not one of law, but of public interest policy. Although the court recognizes that "the contention that divestiture contains elements common to suspect retroactive legislation goes . . . to the reasonableness" of a Commission decision regarding divestiture,[84] the court apparently concludes, without explanation, that the policies underlying the Commission's bias against divestiture are less important than the hope of increasing diversity. Similarly, the court's argumentative debate with the Commission over the specific adverse consequences for broadcast service that a general divestiture might cause does not show that the Commission's concerns are unintelligible or unfounded,[85] but only that in the court's view they all serve "lesser policies" than diversification of broadcast ownership.[86] Under the Communications Act, public interest policy judgments of this sort are peculiarly within the domain of the

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[83] *See supra* pp. 31-39.

[84] J.A. 390 (footnote omitted).

[85] *See supra* pp. 20, 45-49.

[86] J.A. 427. The court incorrectly asserts that these policies lack "support in the record." *Id.* at 419-27. As shown above at pp.

Commission's regulatory expertise.[87] The "power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity'" under such statutes is delegated to the agency, not the courts.[88] And a reviewing court "is not empowered to

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45-49, the record supports the Commission's conclusions that exceptional continuity of meritorious service would be lost in the event of general divestiture, that meritorious local ownership would be reduced, and that broad divestiture could cause economic disruptions.

In any event, if the court means that in a rule-making proceeding the Commission cannot rely on general policies developed on the basis of its experience in administering its statute unless the policies are supported by evidence adduced by the parties to the particular proceeding at hand, it is simply mistaken. "[S]ince rulemaking is 'sub-legislative,' it permits the agency to look beyond the record at a whole range of interests." Verkuil, "Judicial Review of Informal Rulemaking," 60 *Va.L.Rev.* 185, 189 (1974). "The agency, in rulemaking, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise." Pacific Coast European Conf. v. U.S., 350 F.2d 197, 205 (9th Cir. 1965); *see also* Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889, 892 (D.D.C. 1965); Shapiro, "The Choice of Rulemaking or Adjudication in the Development of Administrative Policy," 78 *Harv.L.Rev.* 921, 937 (1965).

[87] This elementary principle has been fully recognized in prior decisions of the Court of Appeals. In Pinellas Broadcasting Co. v. FCC, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956), in a comparative proceeding involving *new* license applicants, the Commission chose a local newspaper owner over competing applicants one of whom had no local media interests. The Commission held that diversification, while important, was not determinative. *Id.* at 209. The court said of this determination:

> "The Commission is operating within the area of legislative-executive judgment. The courts cannot interfere so long as the process, the premises, and the judgment are not arbitrary." *Id.* at 206.

See also McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

[88] Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 293 (1974), *rehearing denied*, 420 U.S.

substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 416.

Nor does the court stop at substituting its judgment by reversing the Commission. Having rebalanced the public interest considerations underlying the Commission's grandfather rule, the court not only vacates the rule but instructs the Commission to adopt a new rule codifying the court's balance. In so doing, it improperly deprives the Commission of its fundamental discretion to grandfather,[60] and denies it the elementary prerogative of making the final assessment of what the public interest requires in light of the purported legal errors identified by the court. The court thereby contravenes the basic principle of appellate review that administrative public interest determinations, unless mere formalities, may be made only by the agency, and not by a reviewing court. *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 806 (1976); *NLRB* v. *Food Store Employees Union,* 417 U.S. 1, 8-9 (1974); *SEC* v. *Chenery Corp.,* 318 U.S. 80, 88 (1943). And it disregards this Court's square holding in *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940).

In *Pottsville,* the Court of Appeals also sought to go beyond identifying Commission error and to impose a final result. This Court reversed an order directing the Commission to accept the court-imposed result. A reviewing court, it said,

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956 (1975), *quoting* United States v. Pierce Auto Lines, 327 U.S. 515, 535-36 (1946); *see also* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957).

[60] *See supra* pp. 35-44.

> "may . . . correct errors of law and on remand the Commission is bound to act upon the correction. [Citations omitted.] But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." [Citation omitted.] *Id.* at 145.

Once the court had identified the legal error in what the Commission had done, it had

> "exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of 'public interest, convenience or necessity' . . . The Court of Appeals cannot write [its views] . . . into the statute as an indirect result of its power to scrutinize legal errors . . . Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute." *Id.*

The rule confining a reviewing court's role to identification of legal error, besides preserving the "integrity of the administrative process,"[20] protects against the possibility that law will be made on the basis of a court's misapplication or misunderstanding of agency policies, or an inadequate consideration of the relevant public interest factors by the agency, or a mere failure of articulation of explanation in an agency opinion. If the agency is not given a chance to repair such non-legal mistakes, whether the court's or its own,

> "the contingencies of judicial review and of litigation, rather than the public interest, would

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[20] NLRB v. Food Store Employees Union, *supra*, 417 U.S. at 9.

be decisive factors. . . ." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145-46.

In the present case, this danger is more than academic. The court misconstrues the agency's diversification policy, elevating diversity from an important public interest factor into a virtually irrebuttable presumption, and ignores or misunderstands a variety of other Commission policies and concerns. In holding the Commission bound by its alleged failure to state satisfactory reasons for not "giving diversity of media ownership controlling weight" (J.A. 443), the court would imprison the Commission in any inadequacies of its opinion-writer and write the court's misunderstanding of Commission policies into law. This mistake exacerbates the usurpation of the Commission's public interest function that pervades the court's opinion.

III. THE COMMISSION'S GRANDFATHER RULES SHOULD BE AFFIRMED.

Because of the plain error of ordering the Commission to require general divestiture, the Court of Appeals decision must be reversed. More fundamentally, the court's holding that the Commission was required to proceed on the basis of a presumption against continuation of its policy toward existing cross-ownerships is in error, and there is no other permissible basis for invalidating the Commission's decision not to order divestiture in the absence of a finding of affirmative need.

The grandfather rules include a provision requiring divestiture of cross-ownerships which the Commission found to have an "effective monopoly"

of major mass media addressing local issues in a particular market. Besides invalidating the decision not to order general divestiture, the court held that the line drawn by the Commission to identify cases of affirmative need for divestiture was irrational. J.A. 429-30.

The Commission's decision to order divestiture in cases of "effective monopoly" is not based on any showing in the record, but on the Commission's prima facie presumption that there was a danger of insufficient diversity of points of view as well as inadequate economic competition in such markets. That presumption is not necessarily compelled. But it does not seem irrational for the Commission to have concluded that any such potential dangers are more likely to be present in cross-ownership markets that lack another local daily newspaper or comparable broadcast station, than where there is such a local competitor. The presence of at least one such competitor would seem to provide both a competitive spur to cross-owned media to offer a greater diversity of information and opinion, and an institutional check against the possibility of abusive use of a cross-ownership to propagandize or indoctrinate. As the Commission recognized, line-drawing often entails some potential arbitrariness. It therefore provided for waiver in individual situations. If divestiture is to be required in any cases, it is difficult to say that the line drawn by the Commission is irrational. In any event, the rationality of the basic decision to grandfather in all but exceptional cases is not affected.

CONCLUSION

For the foregoing reasons, the Commission's rules providing for grandfathering should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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Nos. 76-1471, 76-1521, 76-1595, 76-1604
76-1624, 76-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
THE LOUISVILLE TIMES),
Petitioners,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

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[Consolidated cases listed on inside cover]

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No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*

v.

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IN THE

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OCTOBER TERM, 1977

No. 76-1521

CHANNEL TWO TELEVISION COMPANY,
THE HOUSTON POST COMPANY,
CHRONICLE BROADCASTING COMPANY,
THE CHRONICLE PUBLISHING COMPANY,
KSL, INCORPORATED (DESERET NEWS),
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
THE WASHINGTON POST COMPANY,
WHAS, INC. (THE COURIER-JOURNAL AND
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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL.,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS CHANNEL TWO TELEVISION COMPANY, ET AL.

ARGUMENT

Four answering briefs [1] urge reversal of the Commission's decision to continue its policy of renewing the licenses of existing newspaper-broadcast cross-owners whose broadcast performance has served the public interest, absent a showing of a need for change. These briefs at least make clear that, whatever this Court's disposition of the Commission's grandfather rules, the holding of the Court of Appeals that broader divestiture was required cannot stand. The Solicitor General's brief affirmatively so argues (Brief for the United States at 52), and expressly recognizes that the Commission has discretion under the public interest standard of the Communications Act to adopt such grandfather rules so long as its decision is rationally explained. (*Id.* at 18). Except for the contention of amicus National Emergency Civil Liberties Foundation that the Communications Act should be reinterpreted to prohibit all licensing of cross-owners on the theory that such licensing abridges the freedom of speech, none of the briefs contends that the Commission lacks the authority to grandfather as it did. And none attempts to reconcile the court's holding requiring broader divestiture with decisions of this Court such as *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940),[2] or with the standard of review prescribed in

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[1] Brief for the United States; Brief of Respondent National Citizens Committee for Broadcasting (hereinafter cited as "NCCB Brief"); Brief of National Emergency Civil Liberties Foundation, *Amicus Curiae;* and Brief *Amici Curiae* of the Office of Communication of the United Church of Christ, *et al.*

[2] *See also, e.g.*, South Prairie Construction Co. v. Local No. 627, Int'l Union of Operating Engineers, 425 U.S. 800, 806 (1976); NLRB v. Food Store Employees Union, 417 U.S. 1 (1974); FPC v. Idaho Power Co., 344 U.S. 17, *rehearing denied,* 344 U.S. 910 (1952).

Citizens to Preserve Overton Park, Inc. v. *Volpe,* 401 U.S. 402 (1971).

Accordingly, the decision of the Court of Appeals must be reversed, and the only substantial question before this Court involving existing cross-ownerships is whether the Commission's grandfather rules should also be affirmed. The Solicitor General contends that, although the Commission had discretion to grandfather existing cross-ownerships, and could properly have done so in this case for "an articulable reason reflecting consistent analysis of the public interest" (Brief for the United States at 18), a remand is nonetheless required on the ground that the Commission failed adequately to explain its reasons for grandfathering in this case.

It is true that the Commission is required to say enough in exposition of a public interest policy determination to show that it is not irrational in substance and is based on consideration of relevant public interest factors. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416. But reviewing courts do not sit to instruct agency opinion-writers in the art of legal writing. "Under the 'arbitrary and capricious' standard the scope of review is a narrow one." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 (1974), *rehearing denied,* 420 U.S. 956 (1975). While a court "may not supply a reasoned basis for the agency's action that the agency itself has not given, . . . [it] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 285-86; *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595, *rehearing denied,* 325 U.S. 891 (1945); *Kurzon* v. *United States*

Postal Service, 539 F.2d 788, 792-93 (1st Cir. 1976); *Hooker Chemicals & Plastics Corp.* v. *Train,* 537 F.2d 620, 632 (2d Cir. 1976). It is a conspicuously inefficient use of scarce federal judicial resources to protract the review of obviously rational agency decisions whenever close analytical dissection of the agency's explanatory language and the imagination of counsel can develop arguments for which the opinion itself contains no express refutation.

The Commission's explanation of its determination not to give its new prospective cross-ownership policy full retrospective effect by requiring broad divestiture, is more than adequate to show that the determination was not irrational. It requires little explanation to establish the rationality of a determination not to change long-standing policy, or to grandfather existing relationships when adopting new policy in the absence of a showing of affirmative need for divestiture. Such decisions are essentially self-justifying, especially where as in the present case they reflect a consistent application of the agency's fundamental licensing policy. The Solicitor General's contention that the Commission's grandfathering is not "automatically reasonable" like grandfathering by other agencies because broadcast licensees do not acquire rights in their licenses beyond the license term, is unfounded and unsound. In addition, the potential adverse consequences of divestiture articulated by the Commission set forth a rational basis for the decision to grandfather in this case, notwithstanding the elaborate argumentative efforts to discredit them mounted by the Court of Appeals and echoed by its supporters in this Court.

A. The Commission's Decision to Grandfather Required No Special Justification.

As shown at length in our main brief,[3] the proposal to divest all existing cross-owners would have changed an established policy favoring meritorious existing cross-ownership that has consistently coexisted with the Commission's long-standing emphasis on diversification of ownership where prospective cross-owners are concerned. This different policy toward incumbent cross-owners with good records of performance reflects the sharp distinction drawn in the Commission's overall licensing policy between prospective licensing on the one hand and continued licensing of broadcast owners who have served the public interest on the other. In addition, the Commission has in the past routinely grandfathered existing relationships or otherwise sought to avoid extensive divestiture when adopting new policies, thereby reflecting an underlying bias of the legal system against disappointing expectations built on existing policy or disrupting lawful arrangements in the absence of a strong affirmative showing of need.[4] For these reasons, the Commission properly proceeded on the premise that it was divestiture, and not grandfathering, that required affirmative justification in this case. *Second Report and Order*, ¶¶ 99, 108, 112 nn.29, 30 (J.A. 188-90, 196-97, 200-02).

The Solicitor General concedes that grandfathering is "routinely employed by legislatures and by administrative agencies to protect legitimate expectations,"

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[3] Brief for Petitioners Channel Two Television Company, *et al.*, at 27-35.

[4] *Id.* at 35-44.

and that its employment "is a reasonable means of implementing policy changes." (Brief for the United States at 47). But he contends that grandfathering by the FCC is a special case, not entitled to such routine treatment, because the Communications Act provides that a broadcast license does not "create any right, beyond the terms, conditions, and periods of the license," and that a broadcast licensee has no "claim to the use of any particular frequency . . . because of the previous use of the same. . . ." 47 U.S.C. §§ 301, 304. The Solicitor General asserts that these provisions deny broadcast licensees "the sort of interest that would make grandfather treatment by the Commission automatically reasonable." (Brief for the United States at 47-48).

This argument is without precedent and without merit. The cited provisions of the Communications Act establish that the mere fact of incumbency, without more, does not entitle a licensee to renewal. Renewal is to be determined by reference to the standard of the public interest, convenience and necessity, and may be granted only if the Commission finds, after reviewing the record of the licensee's performance during the license term, that renewal would serve the public interest. The provisions relied on by the Solicitor General make clear that, if the Commission properly does not so find, no right or claim of the licensee has been infringed by nonrenewal of his license. *See Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327, 331-32 (1945); *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475, *rehearing denied*, 309 U.S. 642 (1940); *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933) (decided under the predecessor statute).

These provisions have never been construed to mean that the Commission may not give consideration to the equities of incumbent licensees whose performance it finds has been in the public interest, whether in rule-making proceedings or otherwise. On the contrary, the Court of Appeals below has in the past gone so far as to recognize that meritorious licensees may acquire "legitimate renewal expectancies," which the Commission is *required*, not merely permitted, in some measure to protect.[8] Even if such protected expectancies were forbidden, not required, it would not follow that the Commission is deprived of discretion even to consider such interests, much less that its general administrative discretion to grandfather when adopting changes in policy is uniquely curtailed.

The rationality of commonplace administrative and legislative grandfathering does not rest on the assumption that the beneficiaries have a right or claim that is entitled to protection. It is clear that in many cases of grandfathering, while the agency has discretion to grandfather routinely, it also has discretion *not* to grandfather if it concludes there is a sufficient public interest need for giving its new policy full retrospective effect. Apart from the general considerations of fairness in seeking to avoid disappointing expectations built on established policy, grandfathering is an elementary tool of legislative rule-making because it gives the agency flexibility to experiment and adapt to changing circumstances without having to confront the

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[8] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, *rehearing denied*, 404 U.S. 877 (1971); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976).

resistance and the disruption that would be occasioned by uprooting existing relationships. Such flexibility to act prospectively is vital to an agency, as to a legislature, quite apart from any interests or claims of equity on the part of those who are grandfathered.[6]

The Solicitor General's argument that the Commission is uniquely disqualified from routine grandfathering also fails to come to grips with the fact that the Commission has routinely grandfathered in the past. The Solicitor General cites several cases in which the Commission has not grandfathered, but ignores the numerous cases cited in our main brief where it has done so or has acted expressly to minimize the need for divestiture in adopting new policies.[7] Indeed, in this very proceeding, the Commission routinely decided to grandfather all existing cross-ownerships of radio and television stations, barred prospectively since 1970 under the *First Report and Order* in this proceeding (J.A. 33-100), with substantially less explanation than it gave for grandfathering most newspaper-broadcast cross-owners (*Second Report and Order*, ¶ 30, J.A. 150-51), and no party even appealed the decision. The fact is that, if the Commission had grandfathered newspaper cross-owners by noticing only prospective rules, as it did in the 1968 Notice of Proposed Rule-making that began the present proceeding,[8] the ques-

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[6] *See* cases cited in Brief for Petitioners Channel Two Television Company, *et al.*, at 42 n.64.

[7] *Id.* at 36-37 nn.53, 54.

[8] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Notice of Proposed Rule-making, 33 Fed. Reg. 5315 (1968). The 1968 Notice proposed rules to bar broadcast cross-ownerships (radio-television and AM-FM radio) on a prospective basis only. These prospective rules were adopted in the First Report

tion of its authority to grandfather without explanation would not even have been presented for judicial review.

Finally, the Solicitor General's argument does not take account of the extent to which grandfathering in this case is supported by the traditional distinction the Commission draws in its licensing policy between new applicants and meritorious incumbents—a distinction based on the Commission's view of the public interest in the best practicable broadcast service.[9] The Solicitor General obscures this difference by repeating the erroneous assertion of the Court of Appeals that the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), has been applied to comparative *renewals* (Brief for the United States at 5)—misciting *Seven (7) League Productions, Inc.*, 1 F.C.C.2d 1597 (1965), both for that proposition and in a different context as well.[10] The Solicitor Gen-

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and Order. (J.A. 33-100). The Commission then proposed divestiture rules for such broadcast cross-ownerships in its 1970 Further Notice of Proposed Rule-making (J.A. 101-26), but declined to adopt them in the Second Report and Order under review in this proceeding. (J.A. 150-51).

[9] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 25-35.

[10] In *Seven (7) League Productions*, the 1965 Policy Statement ment was applied only to the introduction of evidence in comparative renewal hearings. As the Commission has made clear, that holding did not mean that the standards of the Policy Statement would be applied in deciding the merits of comparative renewal licensing decisions. *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 34 n.51.

The Solicitor General also incorrectly cites *Seven (7) League Productions* as a case in which the Commission declined to issue a broadcast license to a person publishing a newspaper in the same community. (Brief for the United States at 15). In fact, the case had nothing whatever to do with newspaper-broadcast cross-ownership.

eral does acknowledge that the Commission properly accords an "expectation of renewal" on the basis of a good record of past performance, but he mistakenly contends that only "truly superior service" is sufficient to support such an expectation. (Brief for the United States at 48-50). That contention is based on dicta in a Court of Appeals decision that did not bind the Commission and does not reflect the Commission's long-standing policy and construction of its public interest mandate.[11]

The Solicitor General also makes the general point that, under the *Chenery* doctrine,[12] a court should not consider justifications for an agency's decision that were not relied on by the agency. (Brief for the United States at 45). It is unclear how this principle could apply (or whether the Solicitor General intended it to apply) to the argument that the Commission's grandfathering was "automatically reasonable," [13] as the Solicitor General indicates it would have been if adopted by another agency. The Court of Appeals had no difficulty in perceiving that the Commission was presuming the rationality of grandfathering absent a showing of need for divestiture, although it held that the Commission's presumption was impermissible. If the presumption was indeed "automatically reasonable" as shown above, it would be empty formalism to insist that the agency must say so expressly before a court can

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[11] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 32 n.50 and cases cited therein.

[12] SEC v. Chenery Corp., 318 U.S. 80 (1943).

[13] The Solicitor General's only response to the argument is addressed in terms of the narrow contention that the Commission should not be upheld on the basis of the "expectancy interest" of existing licensees. (Brief for the United States at 46-51).

affirm the agency's policy determination on that basis or take account of its inherent rationality in evaluating the explanation the agency gave.

In short, the Solicitor General's brief fails to refute the Commission's evident premise that the burden of justification rested upon those who proposed divestiture, and that in the absence of any such justification other than the Commission's long-standing diversity policy the rationality of grandfathering required no special justification.

B. The Specific Potential Adverse Consequences of Divestiture Articulated by the Commission Rationally Support Its Grandfather Rules.

Notwithstanding its premise that the burden of justification was on the proponents of divestiture, the Commission concluded that broad divestiture would or could have concrete adverse public interest consequences which, taken together, outweighed the presumed gain in diversity from breaking up existing cross-ownerships. The Solicitor General concedes that the Commission could validly conclude that some public interest considerations are more important than diversification of ownership. (Brief for the United States at 34). He recognizes that the choice among public interest considerations is for the Commission to make unless its decision is arbitrary or internally inconsistent. (*Id.* at 35). But following the Court of Appeals, he contends that the policies and concerns identified by the Commission are so inconsequential and unfounded that the Commission could not rationally prefer them to a presumed increase in diversity. (*Id.* at 36-46).

In part, this contention rests on a misunderstanding of the Commission's emphasis on the importance of

diversity in adopting the prospective rules. The Commission regarded "true diversity"—diversity of information and opinion expressed through the media—as a primary public interest objective served by its prospective rules. *Second Report and Order*, ¶¶ 99-101 (J.A. 188-91). It relied upon a presumption that diversification of media ownership would bring about some increase in true diversity—thus yielding an "abstract" or presumed gain in every case, even if in fact the actual effect in any particular case might be a negligible gain or no gain or even a net loss. It does not follow from the importance of the ultimate objective that this abstract gain in diversity in any particular case is of transcendent importance. The Commission plainly thought, and said, that it was not. *Id.*, ¶ 108 (J.A. 196-97). The Commission takes the view that "51 [licensees in a market] are more desirable than 50,"[14] but it obviously does not believe that the presumed gain in diversity from adding the fifty-second separate voice is of anything approaching equal importance to the gain from adding a second licensee in a one-station market. The Commission opted for diversity in adopting its prospective rules no matter how small or abstract the "hoped for" gain might be,[15] not because such a gain was all-important but because the Commission concluded that there was now so little to be lost by barring *additional* newspaper cross-ownerships that even the possibility of a small gain in the important objective of true diversity should prevail.[16] As the Commission said repeatedly, there was more to

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[14] First Report and Order, ¶ 21 (J.A. 43).

[15] Second Report and Order, ¶ 109 (J.A. 198).

[16] *Id.*, ¶¶ 100-04 (J.A. 190-93).

be lost where divestiture of meritorious licensees was concerned, and the balance of public interest considerations was necessarily different."

Whether or not a model agency opinion would have more fully elaborated this view, the Commission's "path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra,* 419 U.S. at 286. And it could only trivialize the process of appellate review to send the opinion back to the Commission so that it can rephrase the hyperbolic declaration that "nothing can be more important" than maximizing diversity—a misworded sentence which the Court of Appeals and the Solicitor General both say is not to be taken literally, but which is nonetheless the centerpiece of their contention that the Commission's opinion reflects an internally inconsistent analysis of the importance of diversity.

In part, this contention also rests on an argumentative and unfair disparagement of the specific countervailing public interest considerations articulated by the Commission. The Commission relied primarily on the unusual continuity of service displayed by the long-established newspaper cross-owners as a group, together with corroborative indications that these licensees provide a specially valuable broadcast service.[16]

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[17] *Id.*, ¶¶ 99, 108-09, 112 n.30 (J.A. 188-90, 196-98, 202).

[18] The Solicitor General insists that the Commission did not rely on any superiority of service from existing cross-owners. (Brief for the United States at 45-46). In fact, the Commission said:

> "In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts

As shown in our main brief [19] and in the Commission's brief as petitioner,[20] the Commission has previously recognized the importance of such continuity for reasons not understood by the Court of Appeals. This showing is not met by the arguments of the Solicitor General or the other briefs that track the court's arguments on this point.

Instead, the Solicitor General directs his principal fire at two peripheral considerations mentioned by the Commission—the possible loss of local ownership in some cases and the possibility of economic dislocations affecting broadcast service as a result of a suddenly increased demand for broadcast capital in the event of broad divestiture. The Commission's entire discussion of each of these considerations is confined to a single sentence. *Second Report and Order,* ¶ 108 (J.A. 197). The Solicitor General treats them as if they were the main points of the Commission's argument, and devotes the bulk of his attack on the Commission's rationale to an elaborate attempt to show that these con-

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service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough." Second Report and Order, ¶ 109 (J.A. 197-98) (footnote omitted).

The Commission then noted that the existing newspaper cross-owners broadcast more news, public affairs, and other local programming that the Commission considers important to the public interest than does the average licensee. *Id.* at n.26 and Appendix C (J.A. 198, 230).

[19] Brief for Petitioners Channel Two Television Company, *et al.*, at 45-48.

[20] Brief for Petitioner Federal Communications Commission at 23-26.

siderations, standing alone, are unlikely to be of great significance to the public interest. (Brief for the United States at 37-43). The Commission's principal articulated concerns are discussed last and least. (*Id.* at 43-46). This attempt to discredit the Commission's rationale by overkill on minor points does not establish that it was improper for the Commission even to consider these points or to refer to them as additional possible adverse effects of divestiture in concluding that disrupting the continuity of the specially valuable service provided by existing cross-owners would not serve the public interest.[21]

In sum, the inherent rationality of the Commission's decision to grandfather aside, the Commission said enough in its opinion to show that its decision is rationally supported by the prospect of specific adverse consequences of broad divestiture. Under the proper standard of judicial review, no more is required.

C. The Commission's Treatment of Existing Cross-Owners Is Otherwise Rational.

Respondent NCCB makes the additional arguments, not supported by the Solicitor General, that the Commission's standard for determining which cross-owners should be divested, and its announced policy governing future petitions to deny renewal of the licenses of grandfathered cross-owners based solely on grounds of structural concentration in the market, are both irrational. These arguments are unpersuasive.

The Court of Appeals held that even if the Commission properly determined that broad divestiture was

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[21] *See* Brief for Petitioners Channel Two Television Company, *et al.*, at 48-49.

not required, it acted irrationally in ordering divestiture of newspaper-broadcast combinations in cases of "effective monopoly," where either the only newspaper and television station or the only newspaper and radio station in a market not served by a television station are commonly owned. The court's view was that "[d]ivestiture . . . may be more useful in the larger markets" than in the monopoly markets (J.A. 430). As the Solicitor General points out, this holding improperly substitutes the court's judgment for that of the Commission, and "[t]he Commission's determination . . . is unquestionably rational as a matter of policy." (Brief for the United States at 51 n.44).

NCCB complains that the Commission acted irrationally in failing to use "Sherman Act or other monopoly definitions" (NCCB Brief at 46) in determining where divestiture would be ordered, asserting without citation that a number of cross-owners who passed the Commission's diversity test have prima facie monopoly shares under Sherman Act standards. (*Id.* at 47 n.62). The Commission's standard of "effective monopoly" is based on considerations of economic competition as well as on the Commission's primary diversity concern.[22] But adjudication of Sherman Act monopoly claims requires resolution on a case-by-case basis of difficult issues of product and geographic market definition, and other complex evidentiary questions. It was plainly rational for the Commission to decide not to attempt to resolve such issues in this rule-making pro-

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[22] Second Report and Order, ¶¶ 11, 112-16 (J.A. 140-41, 200-09). The Commission said its focus was on markets in which there appeared to be "a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically." Id., ¶ 112 (J.A. 203).

ceeding. Instead, the Commission made clear that it would consider the public interest consequences of properly supported allegations of economic monopolization under the Sherman Act in hearings on petitions to deny renewal to grandfathered cross-owners,[23] where the result could be not merely divestiture but outright forfeiture of the license. While this may be cause for complaint by grandfathered licensees, it is difficult to see how it reflects any irrational denigration of antitrust concerns.

NCCB then complains that the Sherman Act monopoly standard the Commission said it would apply to future petitions to deny is too restrictive (*id.* at 48-53), even though according to NCCB the application of such a standard would dispossess a number of licensees which the Commission decided should not be divested on grounds of diversity. (*Id.* at 47 n.62). While the thrust of this argument is not entirely clear, it appears to reflect the Court of Appeals' misconception that the Commission "abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest," and that the Commission's monopolization standard does not allow "showings of harm in individual markets" resulting from cross-ownership.[24] In fact, the Commission's standard gov-

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[23] Id., ¶ 130 (J.A. 218-19). Although allegations of economic monopolization under the Sherman Act trigger such hearings, the Commission does not seek to enforce the antitrust laws as such but to apply the public interest standard of the Communications Act. *See* Second Report and Order,¶ 110 (J.A. 198-99); United States v. R.C.A., 358 U.S. 334, 350-52 (1959).

[24] NCCB Brief at 49-50; *see* J.A. 428-29 n.108.

erning petitions to deny applies only to petitions relying on grounds of structural concentration alone. Allegations of abuse or actual harmful effects of cross-ownership in any market will still be entertained.[25]

Nor is it accurate to say that the Commission's Sherman Act standard irrationally "substitute[s] an anti-trust standard" for a standard based on diversity. (*Id.* at 49). The Commission has in this proceeding ordered divestiture in all those cases where it concluded that separation of existing cross-ownerships was required on grounds of diversity. While it is conceivable that the structure of a grandfathered market could change so as to call for divestiture under the "effective monopoly" standard employed in the present proceeding, it was hardly irrational for the Commission to conclude that it would not treat such a hypothetical change as a ground for forfeiture.

NCCB also contends that the Commission has not in fact been applying its Sherman Act monopolization standard with sufficient liberality, citing a recent Commission decision setting a hearing on a petition to deny renewal of a grandfathered cross-ownership only on grounds of abuse. (*Id.* at 50-52). At most, this argument amounts to a claim that the standard enunciated in the *Second Report and Order* was improperly applied in that case, not that it is irrational as articulated. Whether the Commission misapplied its standard in some subsequent renewal proceeding is a question to be resolved on review of that proceeding, and has no

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[25] Second Report & Order, ¶ 130 (J.A. 218-19); *and see, e.g.*, WGAL-Television, Inc., 62 F.C.C.2d 527, 531 (1976).

relevance to the question of the validity of the standard itself now before this Court."[25]

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[25] The Brief of Amici Office of Communication of the United Church of Christ, *et al.*, contends that the Commission has not properly applied its Sherman Act monopolization standard in other individual renewal cases. These arguments are likewise irrelevant to the question of the rationality of the standard as articulated by the Commission in the rule-making under review in this proceeding. Moreover, the grounds of Amici's contention are all unsupported allegations of fact which cannot be considered or adjudicated here. In one instance (the challenge to renewal of the license of Cox Broadcasting Corp. in Atlanta) the allegations have not yet been passed upon by the Commission. In the others, the Commission rejected the principal allegations of monopolization as insufficient on their face and found that the other contentions were not sufficiently supported by specific allegations of fact, as is required under Section 309(d)(1) of the Communications Act. 47 U.S.C. § 309(d)(1). *See* Newhouse Broadcasting Corp. (WSYR-TV), 51 F.C.C.2d 336, 345 (1975), *appeal pending*, D.C. Cir. No. 75-1308; Newhouse Broadcasting Corp., (WAPI-TV), 59 F.C.C.2d 218, 237-38 (1976), *opinion on reconsideration*, 61 F.C.C.2d 718, 720 (1976); Newhouse Broadcasting Corp., (WSYR-TV), 62 F.C.C.2d 271, 277-78 (1976).

While this is not the forum in which to evaluate the Commission's treatment of these allegations, it should be noted that the Commission relied on this Court's definition of monopoly in United States v. Grinnell Corp., 384 U.S. 563 (1966), where the Court said:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-71.

Amici complain that the Commission refuses to infer the second element of this definition from evidence of the first element. (Brief of Amici Office of Communication of the United Church of Christ, *et al.*, at 15). Their sole support for this assertion is the district court opinion in *Grinnell*, which the Supreme Court expressly declined to affirm on this point. 384 U.S. at 576 n.7.

CONCLUSION

For the foregoing reasons, the Commission's rules providing for grandfathering should be affirmed.

Respectfully submitted,

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